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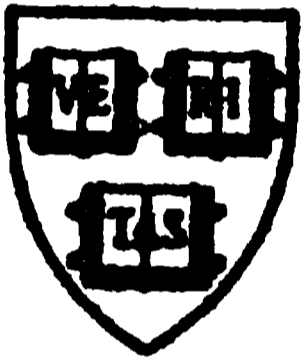
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

LOUISIANA.

VOLUME XXI.

FOR THE YEAR

1869.

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JUDGES
OF
THE SUPREME COURT.

HON. JOHN S. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,	}	<i>Associate Justices.</i>
HON. R. K. HOWELL,		
HON. W. G. WYLY,		
HON. W. W. HOWE,		

SIMEON BELDEN, *Attorney General.*

RULES

ADOPTED BY THE

Supreme Court of the State of Louisiana,

FOR THE NEW ORLEANS DISTRICT,

May 31, 1869.

RULE I.

1. In preparing transcripts of Records, in causes appealed to this Court, clerks of Lower Courts must observe the following requirements:

First—Such transcripts should be written in a fair, legible hand, on good, strong paper (the latter having a double margin on each page thereof), and the various parts should be securely fastened together.

Second—The different portions of a Record should be made to appear in the order of their respective filing.

Third—Provided, however, that when the Records of one or more other suits are introduced as evidence in a cause, such Records should appear in the transcript, distinct from and subsequent in order to the rest of the Record of the principal suit.

Fourth—The transcript should show for which party to the suit each witness is sworn, and by which party each document or record is offered in evidence.

Fifth—No one document should be copied twice in the transcript.

Sixth—An accurate alphabetical index should be attached to and form part of each transcript, affording reference to particular pages of the same (and with proper designations or words of description) for the several pleadings, processes and orders in the suit; for the depositions and testimony of each witness by name (and not by general reference to testimony); for the note of evidence, and for each document, giving the latter its correct title, or some sufficient designation showing its nature and character (and not merely by the letters, marks or figures endorsed thereon).

Seventh—Provided, that when Records of other suits are included in the transcript, as indicated above, in the fourth requirement, a like index to each of such Records should follow the general index.

2. Any neglect or omission to observe this rule strictly will subject clerks as aforesaid to the cost of repairing such neglect or omission.

RULE II.

The party applying for the filing of a transcript of the Record in a cause in this court, must first tender to the clerk his bond, with satisfactory security, in the sum of fifty dollars, for the payment of such fees as may accrue to the clerk, or deposit with the latter, in place of such bond, the sum of twenty dollars.

RULE III.

1. Cases will be docketed in the order of their filing.

2. Pursuant to Act No. 56, of the laws of 1869, the clerk will keep a *Summary Docket*, but will enter causes therein only on the formal application of counsel in writing, stating the facts entitling such causes to a summary trial, and he will so enter in the order of such application.

3. Whenever it shall be made to appear to the Court that a case has been improperly caused by counsel to be placed upon the *Summary Docket*, the same shall thereupon be transferred to the *Ordinary Docket*, and entered at the foot thereof.

RULE IV.

1. Only counsel engaged in a cause will be allowed to withdraw the Record of the same from the clerk's office.

2. Records shall in all cases be receipted for on withdrawal. They should be returned to the office within a reasonable time, and must be so returned on the requisition of the clerk.

RULE V.

Court will be held every day of each alternate week of the session.

RULE VI.

1. On Monday of each court week cases will be called and fixed for the next court week—five for Monday and eight for every other day.

These cases shall be properly posted by the clerk by 11 o'clock of the next day, which shall be notice to all parties. (This portion of the rule will not apply in country terms, during the pendency of which cases will be called and tried continuously in the order in which they are filed)

2. Before the calling of cases, opportunity will be given counsel to have any cause entitled to preference, but not to entry in the *Summary Docket*, made subject, on motion, to be called and fixed for trial.

3. All cases which have stood on the docket for eighteen months without being set down for trial, provided the same have been duly called, may be removed therefrom and placed upon a docket to be called the *Delay Docket*, and shall not be again put upon the Trial Docket except on motion and leave granted thereon.

RULE VII.

1. Within six days after any cause shall be fixed for trial, the appellant shall file with the clerk a printed or fairly written brief or abstract of the cause, containing the substance of all the material pleadings, facts and documents (referring particularly to the pages of the Record where they may be found), and an accurate reference to the points of law and authorities upon which he relies. Seven copies thereof to be furnished and filed with the clerk; one for the opposite counsel and the remainder for the use of the Court.

2. Within twelve days after the fixing of a cause the appellee shall also file seven copies of a similar brief embodying the requirements set forth in regard to the appellant.

3. No cause shall be heard unless one at least of the parties has complied with the foregoing sections of this rule, and if neither party has so complied, the case shall be continued and go to the foot of the docket. If only one party has complied he may argue or submit the cause, or he may decline to do either, in which last event the case shall be continued and go to the foot of the docket, and it is made the duty of the clerk to inform the Court on this point when a case is called for trial.

4. The clerk shall receive no brief in a cause, after it is submitted, unless accompanied by a certificate in writing from counsel that he has delivered a copy to the opposite counsel with the date of such delivery, or by a written acknowledgment or waiver of such delivery signed by opposite counsel, who shall have, upon application to the Court, a reasonable time from the date of such delivery or waiver in which to reply; and in such cases seven copies must be filed by each party as prescribed in the first section of the rule.

5. All briefs in a cause must be filed in the clerk's office, and before the trial of the cause commences.

RULE VIII.

1. The original plaintiff in the Lower Court shall have the right of opening and closing the argument of the cause in this Court.

2. Not more than one hour will be allowed for an opening argument; one hour to each counsel for the defence (not exceeding two); and one hour for the closing argument, except where in special cases the Court, on application made before the opening argument is begun, may otherwise order. The time not consumed by one counsel will not be allowed by another.

RULE IX.

1. Applications for rehearing must be by written or printed petition filed within the legal delay, and must state fully all the points and authorities on which the party founds his application. Additional time for elaborating the argument on such points and authorities may be granted upon a proper showing, if made before the delay expires.

2. When a petition for rehearing in any cause is filed, the clerk will immediately enter it, with its date, in the docket kept for the purpose, and place the Record with the decision and five copies of the petition in the consultation room.

3. When a rehearing is granted the cause will be immediately called and fixed with preference, and briefs will be required as in the first and second sections of Rule VII.

Oral argument may be granted in the discretion of the Court, if applied for on motion, and four days' notice thereof be given to the opposite counsel.

The clerk will properly designate the cause on the Judge's docket as being upon rehearing, and also the fact when oral argument is to be heard.

4. Only one rehearing in any cause will be granted.

RULE X.

1. Motions for dismissals of appeals shall be filed and fixed for trial by the clerk in his office. They shall be so fixed for Monday of each court week, at least one week's previous notice being given by posting as prescribed in the first section of Rule VI., but if not tried on the day for which they are thus fixed, they shall be continued to Monday of the next court week.

2. Such motions shall set forth distinctly all the grounds relied on, and on their trial shall be argued only in written or printed briefs, which must conform in character and number to the requirements stated in sections first and second of Rule VII.

RULE XI.

1. All motions made in open Court must be offered before the regular business of the Court is begun or after it is closed.

2. No motion will be entertained unless it be in writing, upon not less than a half sheet of paper, and with a proper title endorsed upon it.

3. All instructions to the clerk and agreements of counsel, on which the Court is to act must be in writing and duly filed.

RULE XII.

The Court will entertain no application for writ of prohibition, unless previous notice of intention to make such application shall have been given to the opposite party.

RULE XIII.

Compliance with the third and fourth sections of the Revenue Act of March 9, 1869, relative to licenses of attorneys at law, will be strictly exacted of counsel engaged in causes in this Court.

RULE XIV.

Whenever, pending an appeal, either party shall die, his proper representatives may voluntarily come in and be admitted parties to the suit and thereupon the cause shall be heard and determined as in other cases.

When the appellant dies pending the appeal, if his proper representatives be known and reside within the State, and have not made themselves parties to the case, the appellee may on affidavit apply for an order to summon them to appear within twenty-five days; and in default of such appearance after due return of service, the appellee may move the dismissal of the appeal, or have the cause heard and determined as in other cases.

If the proper representatives of the appellant be not known or do not reside within the State, the appellee may on affidavit obtain an order that unless they appear and become parties within three months from publication, the appeal will be dismissed, and cause the said order to be published three times in a newspaper printed at the seat of Government of the State, or in the place where the Court sits, and upon proof of such publication, and default of appearance the appellee may have the appeal dismissed or the cause heard and determined as in other cases.

If the appellee dies pending the appeal, and his proper representatives be known and reside within the State, and have not made themselves parties to the cause, the appellant may on affidavit, apply for an order to summon them to appear within twenty-five days, and in default of such appearance after due return of service, the appellant may proceed to have the cause heard and determined as in other cases.

If the appellee's proper representatives be not known or do not reside in the State, the appellant may on affidavit obtain an order that unless they appear and become parties within three months from publication, the appellant will proceed to have the cause heard and determined, and cause the said order to be published three times in a newspaper printed at the seat of Government of the State, or in the place where the Court sits, and upon proof of such publication, and default of appearance the appellant may proceed to have the cause heard and determined as in other cases.

In country cases the time of personal summons may be reduced on special application according to circumstances.

RULE XV.

No person applying for admission as an attorney and counsellor at law, shall be examined as such until his name as candidate for admis-

sion shall have been by the clerk published during three judicial days at the foot of the trial list posted at the court room door. Application to be made through the clerk.

The Court will hereafter require of candidates for admission to the bar, not previously licensed in another State:

First—Evidence of citizenship of the United States.

Second—Evidence of good moral character, by certificates in conformity to the statutes of March 29, 1823, and March 20, 1842.

The Court will not be satisfied with the qualification of a candidate in point of legal learning unless it shall appear by examination that he is well read in the following course of studies at least: Story on the Constitution; the general laws of the United States; Vattel's Laws of Nations, or Wheaton's Elements of International Law; the Louisiana Code; the Code of Practice; the Statutes of the State of a general nature; the Institutes of Justinian; Domat's Civil Law; Pothier's Treatise on Obligations; Blackstone's Commentaries, 4th Book; Kent's Commentaries, Smith on Mercantile Law; Story or Parsons on Notes; Chitty or Bayley on Bills; Greenleaf, Starkie or Philips on Evidence; Russell on Crimes; and the Jurisprudence of Louisiana settled by the decisions of the Supreme Court.

The examination shall be conducted in the following manner; At the beginning of the session in New Orleans the Court will appoint from among the members of the bar a committee of seven, who are earnestly requested to lend their aid to the Court. Upon the candidate producing a certificate from the committee that he has been examined by them upon the above works, and that he is in their opinion qualified for admission to the bar, the court will admit him to a public examination, and if after such public examination they concur with the committee in opinion, the candidate will be admitted and licensed as an attorney and counsellor at law, and not otherwise.

The committee will meet twice in each month during the sessions of the Supreme Court, to wit: On the Friday preceding each court week.

The Court will examine on Tuesday of each court week.

Each candidate to be examined separately before the committee and the Court.

The foregoing rules will be observed by the Court in the country districts also so far as practicable.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN

NEW ORLEANS.

JANUARY, 1869.

JUDGES OF THE COURT:

HON. JOHN T. LUDELING, *Chief Justice.*

HON. J. G. TALIAFERRO,	} <i>Associate Justices.</i>
HON. R. K. HOWELL,	
HON. W. G. WYLY.	
HON. W. W. HOWE	

No. 1945.—CITY OF NEW ORLEANS v. C. LUSSE AND R. RHULMAN.

The third section of the act of the Legislature of 1855, page 327, prohibiting Municipal Corporations within the State from levying any tax on persons engaged in selling articles manufactured by themselves within the State, is not in conflict with article 118 of the Constitution of 1868. A tax levied by the city of New Orleans on such persons is illegal.

APPEAL from the Seventh District Court of the parish of Orleans,
Collens, J. F. Michinard, for plaintiff and appellant. *E. Howard McCaleb*, for defendant and appellee.

HOWELL, J. The defendants are sued for a license tax, imposed by section thirty-nine, of Ordinance No. 818 N. S., upon their occupation as brewers for the year 1868.

They plead exemption therefrom by virtue of the third section of the act of 1855, page 327, entitled "An Act relative to Municipal Corporations," in the following words: "That it shall not be lawful hereafter, for any municipal corporation within this State, to lay any tax on persons engaged in selling articles of their own manufacture. manufactured within this State."

The city contends that this section is repealed by article 124 of the Constitution of 1864, and article 118 of the Constitution of 1868, which, it is urged, withdrew from the Legislature the power to exempt from taxation, save in certain specified cases, in which the present tax is not included. The article 124 reads: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law. The General Assembly shall have power to exempt from taxation property actually used for church, school or charitable purposes. The General Assembly shall levy an income tax upon all persons pursuing any occupation, trade or calling, and all such persons shall obtain a license, as provided by law." Article 118 of the Constitution of 1868 is the same, except that in the last clause it says, that "the General Assembly *may* levy an income tax," etc.

In neither do we find anything inconsistent with the power of the Legislature to exempt persons from a *license tax*. Such a power not being prohibited, expressly or by necessary implication, is permitted. See *State v. Volkman*, not yet reported, and the cases in Hen. Dig. 788, III. Nos. 1, 2, 3, 4 and 6.

All laws in force at the time of the adoption of each Constitution, not inconsistent therewith, were continued in operation. The law quoted exempting manufacturers from the tax opposed herein, was declared in the case of the *City v. Mascaro*, 11 A. 733, to be in force, notwithstanding the provision on this subject, in the city charter (see acts 1856, p. 158, § 102); and as the Constitution does not repeal it, we must consider it still in force.

The judge *a quo* did not err in giving judgment in favor of the defendants.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 1164.—Succession of GEORGE MCCAUSLAND.

Where an appeal has been taken from a judgment on a tableaux and opposition thereto, all the parties figuring on the tableaux must be made parties, otherwise the appeal will be dismissed for want of proper parties.

APPEAL from the Seventh District Court, parish of Point Coupee, *Cooley, J. Collins & Leake*, for administrator and appellee, *W. D. Winter* for opponent and appellant.

WYLY, J. The administrator of this succession filed his final account and tableau. An opposition was filed to the homologation thereof, and from the judgment on the opposition this appeal has been taken.

The case is now presented on a motion to dismiss the appeal because all the creditors in the tableau are not made parties thereto, the appeal bond being in favor of only part of the creditors.

Succession of George McCausland.

The creditors in the tableau who make this motion are clearly interested in maintaining the judgment appealed from, and the bond is defective in not being in their favor also.

The motion to dismiss is well taken. (See the case of the succession of Jacob Weigel, lately decided, and the authorities there cited.)

It is therefore ordered that the judgment rendered by this court on fourth February, 1867, dismissing this appeal, remain undisturbed.

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48	434
49	1021
21	3
114	824

No. 1462.—Succession of H. E. A. DOLHONDE, opposition of LOUISIANA MUTUAL INSURANCE COMPANY to the Account of Natural Tutrix.

One partner cannot sue the other for a specific sum until the affairs of the partnership have been liquidated. The liquidating partner of a commercial firm cannot be called in warranty by the administrator on a demand against the estate of a deceased partner.

The holder of a promissory note, deposited before maturity, to secure the payment of a pre-existing debt, has a right to sue for and recover the whole amount.

A, a member of the commercial firm of A & B, executed his two promissory notes, payable to his own order and by him indorsed in blank, secured by mortgage on his individual property. A placed the notes in the hands of the commercial firm of A & B, who deposited them in pledge with C, to secure the payment of a note of the firm. The note of the firm was taken up by them together with the mortgage notes held as collateral security; *Held by the Court*—That the mortgage given to secure the notes of A, was not extinguished by confusion, they not having been returned into his hands. That the fact that they were returned into the hands of the firm of which A was a member did not place them in his individual hands, and the mortgage still exists.

A PPEAL from the Second District Court of New Orleans, *Thomas, J. P. Chas. Cuvellier* for Tutrix, Appellee. *Clarke & Bayne*, for Louisiana Mutual Insurance Company, Appellant.

LUDELING, C. J. H. E. A. Dolhonde was a member of the commercial firm of John S. Wallis & Co.

On the seventeenth day of July, 1865, he executed an authentic act, in which he acknowledged that he was justly and truly indebted to J. M. Crawford in the sum of twelve thousand dollars; that for the reimbursement thereof he had made and signed two promissory notes, dated same day, to the order of and endorsed by himself, each for six thousand dollars, payable two years after date, at the Canal Bank in this city, and bearing seven per cent. per annum interest from maturity and that to secure the payment of the notes he mortgaged certain property in favor of J. M. Crawford, etc. The notes were paraphed by the notary.

The evidence shows that J. M. Crawford had no interest whatever in the notes, that he signed the act of mortgage at the request of Mr. Dolhonde, and that he never had possession of the notes.

On the twenty-fifth of July, 1865, the firm of John S. Wallis & Co. obtained from Pike, Lapeyre & Brother, a loan of ten thousand dollars for thirty days, on the pledge of an envelope containing some un-

current bank bills and the mortgage notes, and in due time Wallis & Co. redeemed their pledge. On the tenth of October, 1865, the firm of Wallis & Co. obtained from the Louisiana Mutual Insurance Company a loan of \$8,000, for which amount the firm executed a note payable *on demand*.

About the middle of December, 1865, the Louisiana Mutual Insurance Company *demand*ed payment of the note, or security; and Dolhonde said "the firm would secure the note by a pledge of *mortgage paper*, as collateral security."

Sometime in the year 1866, Dolhonde died. His widow was confirmed as natural tutrix of his minor children. She caused the property of the succession to be sold, and filed an account and tableau of distribution which was opposed by the Louisiana Mutual Insurance Company on the ground that they are the legal owners and holders of the two mortgage notes, already described, and that as such they are entitled to be paid by preference out of the proceeds of the sale of the mortgaged property, and that the tutrix has failed to place them upon the tableau.

To this opposition the tutrix filed an answer, in which she denies the allegations made in the opposition, and she avers the ownership of the notes to be in the deceased, and consequently the nullity and extinguishment of the notes and the mortgage. She calls John S. Wallis, surviving partner and liquidator of the firm, in warranty.

John S. Wallis excepted to the call in warranty, for the following, among other reasons given, to wit: "there has been no final liquidation of the partnership affairs."

By agreement the exception was referred to the merits.

The exception ought to have been sustained. 10 Mart. 433. 8 N. S. 281 11 An. 509.

It appears that the Louisiana Mutual Insurance Company received these notes before maturity, and in due course of their business, as a pledge to secure the payment of a subsisting debt. The secretary of the Insurance Company, in giving his testimony, says, "When I insisted on the security, the pledge was given"—"When I applied for the amount of the note, Mr. Dolhonde told me the firm would give some mortgage notes as collateral security." The president of the company says, "six per cent. is a fair rate of interest on *call loan notes*. It is important for offices like ours to have money lent on short time, so that it might be called in promptly."

The counsel for the tutrix and appellee admits that the commercial law protects the *bona fide* holder of negotiable paper, received before maturity, against equities existing between the maker and the payee; but he insists that there are exceptions to this rule, and he claims that the case at bar constitutes one of the exceptions, because the notes sued on were given as *collateral security for the payment of a pre-existing debt*.

In *Swift vs. Tyson*, 16 Peters, p. 20, Judge Story as the organ of the

court said, "We have no hesitation in saying, that a *pre-existing debt does constitute a valuable consideration*, in the sense of the general rule already stated, as applicable to negotiable instruments. * * *

"The question has been several times before this court, and it has been uniformly held that it makes no difference whatsoever, as to the rights of the holder, whether the debt for which the negotiable instrument is transferred to him, is a pre-existing debt, or is contracted at the time of the transfer. In each case he equally gives credit to the instrument.

"Every person is, in the sense of the rule, treated as a *bona fide* holder for value, not only when he has already advanced money, or other value for it; but when he has received it in payment of a precedent debt, or when he has a lien on it, or has taken it as a collateral security for a precedent debt, or for future, as well as for past advances." Story on Promissory Notes, § 195.

By the Civil Code, Art. 1887 the obligations which can have no effect are those which are *without a cause*, or which have a *false* or *unlawful cause*.

By the cause of the contract is meant the *consideration* or *motive* for making it. What then was the *cause, consideration* or *motive* for making the pledge? Evidently an extension of the credit or forbearance to sue. There was a cause, therefore, which was neither false nor unlawful. The cause was sufficient. 5 N. S. 562. 12 R. 378. 8 An. 97.

The notes were pledged in conformity to law, and the pledgee had a right to sue for the recovery of the amount thereof. Acts of 1866, p. 266. King v. Gayoso, 8 N. S. 370.

It was held in Matthews v. Rutherford, that in the commercial law the only difference between the absolute holder for value, and the party who takes the note as collateral security, so far as the right of recourse against the maker is concerned, was that the former may recover in full, whilst the latter, if there be equities, is restricted to the extent of his debt. He is considered a purchaser in good faith *pro tanto*. 7 An. 225.

It is urged that the notes were returned to the *maker* after they had been pledged to Pike, Lapeyre & Brother, and that, at least, the mortgage had been extinguished by confusion. The proof, on the contrary, is that John S. Wallis & Co. pledged the notes to Pike, Lapeyre & Brother, and that the firm of John S. Wallis & Co. redeemed the pledge, and the notes and other property pledged were returned to them through John S. Wallis. The secretary of the Louisiana Mutual Insurance Company says, "I asked security of Mr. Dolhonde, and they were handed to me by Mr. J. S. Wallis—all I know is that these notes came from Mr. J. S. Wallis. I understood Mr. Dolhonde, when he said he would give me mortgage paper, that it was paper over which he had control as a member of the firm of John S. Wallis and Company. When treating with Dolhonde I was treating with John S. Wallis & Co."

But we are not prepared to admit that the mortgage would have been extinguished, as between Dolhonde and the Louisiana Mutual Insurance Company, even if it had been proved that the notes had been returned to the possession of Dolhonde individually. The Louisiana Mutual Insurance Company was ignorant of the fact, and Dolhonde himself represented that the notes were secured by a mortgage.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that the opposition of the Louisiana Mutual Insurance Company to the account and tableau of distribution filed by Marie Fourcade, widow of H. E. A. Dolhonde, deceased, and natural tutrix of her minor children, be sustained to the extent of eight thousand dollars, with six per cent. per annum interest thereon from the tenth of October 1865, with privilege upon the proceeds of the sale of the property mortgaged to secure the notes sued on. And it is further ordered that the tableau be amended, and that the Louisiana Mutual Insurance Company be placed upon said tableau as mortgage creditors, to be paid by preference over all other mortgage creditors except Lafitte, Dufilho & Co., and the New Orleans Mutual Insurance Company.

It is further ordered that the succession pay the costs of both courts.

No. 1413.—H. & M. MARX v. L. BLOOM.

An action will not lie to recover an account for goods sold where it is shown that a partnership exists between the parties. In such a case the suit will be dismissed with the rights of the party reserved to sue for a settlement of the partnership accounts.

A PPEAL from the Third District Court of New Orleans, *Fellowes, J. J. B. Cotton*, for appellees, *Breaux & Fenner* for appellant.

HOWE, J. This action is brought upon an open account for bill of goods sold and delivered to defendant, November 2, 1862.

The defendant excepted, and answered that there existed a partnership between the plaintiff and himself in reference to the goods whose price is sued for, and also in reference to certain liquors.

The judge before whom the case was tried arrived at the conclusion that the partnership existed, that the goods were shipped to the defendant for sale, the profits to be divided between plaintiff and defendant; and an examination of the testimony leads us to the same conclusion.

But we think the court erred in holding that under these circumstances the plaintiffs were not bound to resort to an action of accounting and settlement. It is true there was but one shipment, but that fact is not decisive of the question, for there may be many items of accounting necessary to fix the rights or liabilities of partners in the profits or losses of a single consignment. 13 A. 576.

Marx v. Bloom.

The view we have taken of the case renders it unnecessary to consider the plea of prescription of three years.

For the reasons given it is ordered and adjudged that the judgment appealed from be reversed, and that there be judgment dismissing the claim of plaintiffs, with costs in both courts, reserving, however, their rights to sue for a settlement of these transactions, considered as those of a partnership.

No. 1451.—COLLINS & LEAKE v. J. O. FRIEND, ROBERTSON YEATMAN, Garnishee.

In an attachment suit, no judgment can be rendered against the garnishee before judgment is obtained against the debtor.

A PPEAL from the Fourth District Court of New Orleans, *Fellows, J. Cooley & Phillips*, for plaintiffs and appellees. *M. O. Dunn*, for garnishee and appellant.

HOWELL, J. Plaintiffs brought suit by attachment against the defendant, a non-resident, and propounded interrogatories to R. Yeatman as garnishee, who answered, in substance, that he neither held any property belonging, nor was indebted to the defendant, but that, as agent of Mrs. Acklin, in January 1867, he entered into a contract of compromise with the defendant (Friend), Gomkel and Lanier, for annulling a lease of certain plantations in West Feliciana, and purchasing certain movable property thereon from two of said lessees, Gomkel and Lanier, upon its value being ascertained by referees to be chosen by the contracting parties; that no settlement has been made under said contract, on account of an attachment suit of Hunt and Macaulay against said Gomkel and Lanier, and the interventions therein, in which defendant was made garnishee before cited in this suit; that he had knowledge of a written transfer by Lanier, one of said parties, to J. O. Friend, the defendant, of one-half of his interest in said act of compromise, estimated at \$8000, to be paid by the garnishee to said Friend, after paying costs and attorney's fees in the suit of Lanier v. Gomkel; but that individually he is in no way liable to Friend. Plaintiffs then, without any further proceedings against defendant, took a rule to set aside said answers, take the interrogatories for confessed, and obtain judgment against the garnishee for the amount of their claim, to be paid into the hands of the sheriff, on the grounds that the answers are untrue, and that they show he has funds belonging to defendant. On the trial the only testimony was that of the garnishee, who testified that he acted only as the agent of Mrs. Acklin, whose funds he held, which he was prepared, when legally authorized, to pay to any one decreed entitled thereto under the act of compromise and the private transfer; that after paying the claims having preference over Lanier's claim, there was coming to Lanier \$1200 or \$1300 and that he felt himself bound to pay any balance there may be to Lanier

But we are not prepared to admit that the mortgage would have been extinguished, as between Dolhonde and the Louisiana Mutual Insurance Company, even if it had been proved that the notes had been returned to the possession of Dolhonde individually. The Louisiana Mutual Insurance Company was ignorant of the fact, and Dolhonde himself represented that the notes were secured by a mortgage.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that the opposition of the Louisiana Mutual Insurance Company to the account and tableau of distribution filed by Marie Fourcade, widow of H. E. A. Dolhonde, deceased, and natural tutrix of her minor children, be sustained to the extent of eight thousand dollars, with six per cent. per annum interest thereon from the tenth of October 1865, with privilege upon the proceeds of the sale of the property mortgaged to secure the notes sued on. And it is further ordered that the tableau be amended, and that the Louisiana Mutual Insurance Company be placed upon said tableau as mortgage creditors, to be paid by preference over all other mortgage creditors except Lafitte, Dufilho & Co., and the New Orleans Mutual Insurance Company.

It is further ordered that the succession pay the costs of both courts.

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Howe, J. This action is brought upon an open account for bill of goods sold and delivered to defendant, November 2, 1862.

The defendant excepted, and answered that there existed a partnership between the plaintiff and himself in reference to the goods whose price is sued for, and also in reference to certain liquors.

The judge before whom the case was tried arrived at the conclusion that the partnership existed, that the goods were shipped to the defendant for sale, the profits to be divided between plaintiff and defendant; and an examination of the testimony leads us to the same conclusion.

But we think the court erred in holding that under these circumstances the plaintiffs were not bound to resort to an action of accounting and settlement. It is true there was but one shipment, but that fact is not decisive of the question, for there may be many items of accounting necessary to fix the rights or liabilities of partners in the profits or losses of a single consignment. 13 A. 576.

Marx v. Bloom.

The view we have taken of the case renders it unnecessary to consider the plea of prescription of three years.

For the reasons given it is ordered and adjudged that the judgment appealed from be reversed, and that there be judgment dismissing the claim of plaintiffs, with costs in both courts, reserving, however, their rights to sue for a settlement of these transactions, considered as those of a partnership.

No. 1451.—COLLINS & LEAKE v. J. O. FRIEND, ROBERTSON YEATMAN,
Garnishee.

In an attachment suit, no judgment can be rendered against the garnishee before judgment is obtained against the debtor.

A PPEAL from the Fourth District Court of New Orleans, *Fellows, J. Cooley & Phillips*, for plaintiffs and appellees. *M. O. Dunn*, for garnishee and appellant.

HOWELL, J. Plaintiffs brought suit by attachment against the defendant, a non-resident, and propounded interrogatories to R. Yeatman as garnishee, who answered, in substance, that he neither held any property belonging, nor was indebted to the defendant, but that, as agent of Mrs. Acklin, in January 1867, he entered into a contract of compromise with the defendant (Friend), Gomkel and Lanier, for annulling a lease of certain plantations in West Feliciana, and purchasing certain movable property thereon from two of said lessees, Gomkel and Lanier, upon its value being ascertained by referees to be chosen by the contracting parties; that no settlement has been made under said contract, on account of an attachment suit of Hunt and Macaulay against said Gomkel and Lanier, and the interventions therein, in which defendant was made garnishee before cited in this suit; that he had knowledge of a written transfer by Lanier, one of said parties, to J. O. Friend, the defendant, of one-half of his interest in said act of compromise, estimated at \$8000, to be paid by the garnishee to said Friend, after paying costs and attorney's fees in the suit of Lanier v. Gomkel; but that individually he is in no way liable to Friend. Plaintiffs then, without any further proceedings against defendant, took a rule to set aside said answers, take the interrogatories for confessed, and obtain judgment against the garnishee for the amount of their claim, to be paid into the hands of the sheriff, on the grounds that the answers are untrue, and that they show he has funds belonging to defendant. On the trial the only testimony was that of the garnishee, who testified that he acted only as the agent of Mrs. Acklin, whose funds he held, which he was prepared, when legally authorized, to pay to any one decreed entitled thereto under the act of compromise and the private transfer; that after paying the claims having preference over Lanier's claim, there was coming to Lanier \$1200 or \$1300 and that he felt himself bound to pay any balance there may be to Lanier

 Collins & Leake v. Friend—Yeatman, garnishee.

and not to Friend. The Judge *a quo* gave judgment ordering the garnishee "to proceed within the shortest delay possible to settle his account as agent of Mrs. Acklin, and pay over to the sheriff one-half of the amount found to be due to Lanier, to be held subject to the claim of plaintiffs." From which the garnishee appealed.

The judgment is erroneous in ordering the garnishee to make a settlement with third parties and pay any sum into the hands of the sheriff before judgment is rendered against the defendant.

The only questions between the plaintiffs and garnishee are, is the latter indebted to the defendant, and can he safely pay the plaintiffs? To ascertain this he may perhaps be required, in certain circumstances, to show the state of his accounts with the defendant, but not other parties, or to institute or prosecute legal proceedings against persons with whom the defendant may have contracted; and in no case can judgment be had against a garnishee before judgment is obtained against the debtor. 5 N. S. 307; 12 L. 16; 10 R. 133; 14 A. 374. This proceeding is therefore prematurely acted on.

It is therefore ordered that the judgment appealed from be reversed, and the cause remanded for further proceedings according to law.

No. 1458.—GEORGE SIEGEL v. PHILIP DRUMM.

The stipulation in the act of mortgage of five per cent. to cover attorney's fees in case the holder is compelled to resort to legal proceedings to compel payment of the obligation is not usurious. Damages will not be allowed for frivolous appeal unless prayed for in the answer to the appeal.

A PPEAL from the Sixth District Court of New Orleans, *Leamont, J.* Fifth District Court, presiding. *Walter H. Rogers* and *G. H. Braughn* for appellee, *Cotton & Levy* for appellant.

TALIAFERRO, J. The defendant appeals from an order of seizure and sale rendered against him by the Judge *a quo* upon a promissory note for the sum of \$3600 secured by mortgage. The defense set up in this court is that the contract is usurious, inasmuch as there is a stipulation of eight per cent. interest and five per cent. to cover attorney's fees in case the plaintiff should be compelled to resort to legal means to compel payment of the obligation. This court has frequently decided that such a stipulation as to attorney's fees does not constitute usury. 11 An. 217, 12 An. 407.

It would seem that the course pursued by the defendant has been merely for procrastination, and that his appeal may properly be classed with those which receive no countenance from this court.

The plaintiff's counsel asks in his brief that this court award damages for a frivolous appeal. This we are precluded from doing, as he has filed no answer to the appeal. See Code of Practice, Article 907, 8 An. 73.

It is ordered, adjudged and decreed that the judgment of the lower court be affirmed, and that the sheriff proceed according to law to the execution of the writ issued in the case.

No. 1865.—D. E. MANDELL v. MAYOR AND CITY OF NEW ORLEANS.

Officers of the city of New Orleans who received their appointment from the military authority during the time the city was under military control, have no claim against the city for salary for the term fixed by law for such office, where it is shown that they have been dismissed by the military before the term of the office expired by law.

Where the salary of an officer is fixed by law for all services rendered in his official capacity, no action will lie for the recovery of additional compensation for alleged extra services.

A PPEAL from the Sixth District Court of the Parish of Orleans, Cooley, J. E. Filleul, for appellee, B. R. Forman, for appellant.

LUDELING, C. J. The evidence shows that the plaintiff was appointed a member of the Board of Assessors of the city of New Orleans by the military commandant of the city of New Orleans, on the nineteenth day of September, 1862, and that he continued to discharge the duties of said office until the seventh November 1865, when he was removed by Acting Mayor Kennedy.

It is in proof that the compensation to be allowed to the assessors for all services performed by them was fixed at one hundred and seventy-five dollars per month, on the first December 1862. That this salary was payable monthly, that it was punctually paid. One of plaintiff's witnesses says: "The assessors have always been paid as the pay rolls fall due, as long as they retained their position. I don't remember that the assessors were ever paid the balance of the year, after seventh November, when their work was complete."

There is no evidence to show that the salary above fixed was changed until June 28, 1866, long after the plaintiff had ceased to perform the duties of the office. It is fair to presume that the salary at which he was engaged as a member of the Board of Assessors was one hundred and seventy-five dollars per month. He was entitled to be paid for the time he served as a member of the Board of Assessors, to wit: from the nineteenth of September, 1862, to the seventh of November, 1865, at the rate of \$175 per month.

The plaintiff claims that he had a right to the office for *the term of two years*, dating from the first Monday in January, 1865, and ending the first Monday in January, 1867; that notwithstanding his removal on seventh November, 1865, he is entitled to be paid for the unexpired term of two years. He further claims additional compensation for assessing the eighth district in 1865.

The evidence in the record proves that the city of New Orleans had been divided into twelve assessment districts, and that these districts

were reduced to six, in the early part of 1865, and that to the plaintiff was assigned the duty of assessing the fourth and the eighth districts.

It is true there is some testimony to show that when the plaintiff was informed of this change he complained, and at first made objection to this increased labor, without additional compensation, and that he consented to do the additional work when Watkins (his witness) told him that Mayor Hoyt said "it should be all right, that plaintiff should be paid, though no compensation was specified." But we cannot admit that the declarations of Mayor Hoyt made in conversation with third parties can bind the city, or change the compensation of officers, which had been fixed by the bureau of finance. Even if we admit that the city could be bound in that manner, the evidence only shows that the Mayor said the plaintiff should be paid for the additional work. No amount was specified. The plaintiff, who was a witness in his own behalf, swears he "did not agree to do the work for nothing." He says Mr. Watkins said to him "that he should be paid for it." And upon this, he claims the salary of two offices! The evidence does not show that any of the other assessors was paid two salaries. But it does show that some of them, who assessed two districts, were allowed small additional compensations; and from the testimony of Watkins we infer that something of the kind was expected, *ex gratia* of the Mayor or Bureau. And the admission of the plaintiff proves that he received *fifty dollars* on account of extra work.

The contest about pay for additional labor will seem strange when we remember that the assessors were paid for their services for what they did, per month, and that when their work was done, their engagement ended, and consequently their pay.

The plaintiff has been paid all that was due him, and the evidence, in this case satisfies us that his claims are without any foundation in law or in equity. He was appointed to perform the duties of assessor by the military authorities in New Orleans, without any fixed term. He held that position at their pleasure, and he had no right to the salary of the office, beyond the time he actually served.

He did not hold the office under the provisions of the city charter, and it is unnecessary to inquire into the question whether acting Mayor Kennedy had the *legal* right to remove him or not. The government of the city was under the control of the military authorities, and they *permitted* the removal of the plaintiff or it could not have been done.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of the defendants, and that plaintiff and appellant pay the costs in both courts.

Rehearing refused.

Marquise de la Villa Palma v. Abat & Generes, et al.

No. 1446.—MARQUISE DE LA VILLA PALMA v. ABAT & GENERES, et al.

The insertion in the Act of Mortgage of the pact *de non alienando* does not invest the mortgage creditor with the right to disregard the forms of law in making a forced alienation of the mortgage debtor's property. The non-alienation clause springs from the agreement of the parties and dispenses the mortgage creditor from the necessity of resorting to the hypothecary action.

The transferee of mortgaged property with the pact *de non alienando* contained therein, may sue to annul a forced sale of the property by the mortgaged creditor on the ground that the formalities of law have not been observed in making the sale.

The objection that the mortgagee or his transferee has the right to require that the property mortgaged shall be sold in separate parcels, comes too late if not made before the sale. This act in itself furnishes no ground to annul the sale.

A PPEAL from Third District Court of New Orleans, *Fellows, J. A. & M. Voorhies*, for appellant, *C. Dufour*, for Abat & Generes, appellees.

WYLY, J. Plaintiff, the purchaser of three lots subject to a special mortgage with pact *de non alienando*, sues to annul a subsequent sale under the foreclosure of said mortgage. The sale was made under executory process, and the three lots and improvements were sold in block, although appraised separately, and although described in the act of mortgage as separate lots.

Plaintiff's vendor, A. Costa, had mortgaged these lots prior to selling them to her, and defendants had been the owners and holders of the mortgage note under which the sale was made contradictorily with a curator *ad hoc*, representing the mortgage debtor, A. Costa, who was an absentee. The appraisers were duly appointed by this curator *ad hoc* and the mortgage creditors on the day of sale.

They appraised two of the lots together at \$1800, and the third lot by itself at \$1000, making total amount of appraisement \$2800.

The curator *ad hoc* gave the sheriff no instructions whether to sell the property in block or separately; and the same was sold by the sheriff in block under instructions of the seizing creditor's counsel, for the price and sum of \$3675 cash.

On the trial in the lower court there was judgment in favor of defendant, and against plaintiff. Plaintiff has appealed.

The various grounds of nullity set out in the petition, are all abandoned by plaintiff's counsel in the argument before this court, except the position that the sale is null because the lots were sold in block by the sheriff and not separately.

We concur with plaintiff that the insertion in the act of mortgage of the pact *de non alienando*, does not invest the mortgage creditor with the right to disregard the forms of law in making the forced alienation of his mortgage debtor's property.

We think the non-alienation clause springs from the agreement of the parties and not from a prohibitory law, based upon motives of public policy forbidding the transfer of property so mortgaged. The advantage of this clause is to save the mortgage creditor the necessity of resorting to the delays of the hypothecary action. He can proceed to

enforce his mortgage directly against his mortgage debtor without reference to the transferee of that debtor. But still the transferee is subrogated to his vendor's rights by virtue of the purchase, and has sufficient interest in the object of the contract of mortgage to sue to annul the sale if the forms of law have not been complied with by the mortgage creditor of his vendor in making the forced sale. *

But from a careful examination of the law and the evidence in this case, we cannot concur with plaintiff that the sale is null because the lots and improvements were sold in block and not separately. The property sold in block for a much larger price than its appraisement, which was made separately. There is no evidence that the bystanders would have bid a greater price if the offering had been made separately.

But what right has this plaintiff to complain of the sale of property which she only held subject to the rights of her vendor's mortgage creditor? With the non-alienation clause she could not expect to be made a party to the sale. She occupied no better position than her vendor, and the sale was made contradictorily with him, through the curator *ad hoc* appointed by the court; and we regard the sale as valid. Even if the defendant in execution had the right to require the property to be sold separately, which we do not admit, still the objection now comes too late after the sale has been made contradictorily with the curator *ad hoc*. We cannot now permit that objection to be set up to the title acquired by the purchaser. (10 A. 725, 726).

The officer who made the sale in this case testifies that the curator was present and appointed an appraiser, but did not require him to sell the property separately; and this is corroborated by the evidence of the curator *ad hoc* himself.

The objection that the property was sold by the sheriff in block now comes too late. (See the case of Taylor v. Graham, 18 A. 656.)

For the reasons assigned we are of opinion that the plaintiff has failed to make out her case, and her action of nullity must be dismissed. It is therefore ordered that the judgment of the District Court be affirmed with costs.

APPLICATION FOR REHEARING, BY A. & M. VOORHIES.

The plaintiff respectfully prays for a rehearing, assigning as grounds:

I.—That *the fact* upon which this honorable court bases its opinion to *conclude and estop* plaintiff, so far from being borne out by the record, does not exist, AND IS NOT AVERRED BY THE DEFENDANTS THEMSELVES.

The court says that the curator *was present at the sale* and appointed an appraiser, but did not require the officer to make the sale separately; and that this is shown by the testimony of the officer and of the curator. If the curator had been present at the sale and had remained silent, then, clearly under the decision in 10 An. p. 725, the purchaser would be entitled to protection; for that would be a clear case of estoppel. The *presence and silence* of the party at the sale, protects third persons purchasing against all informalities and illegalities. But *the curator was not present at the sale*; and we say emphatically that he does not so

state in his testimony, nor does the officer make such a statement. The whole testimony of the curator is at page 56, Rec., and ALL he says is, "he gave no instructions at all to the sheriff in regard to the properties seized and sold in that case." Not a word more!

Mr. de Armas, the officer, (Rec. pages 56-57) does not as much as allude to the curator *ad hoc*, nor to his presence at the sale, nor even to his appointing an appraiser!

The only part of the record that mentions the appointment of an appraiser by the curator, is the very report of the appraisers, marked X, Rec. p. 39. This appointment was made on the seventeenth March, 1866, two days before the sale! (Rec. pp. 39, 48).

II.—The case of Taylor v. Graham, 18 An. 656, does not present a case where the property was appraised separately and sold in block, notwithstanding the fact that the party had appointed an appraiser who actually had appraised the properties separately. Judge Usley says the objection simply was, "that the sheriff sold in block two distinct and separate pieces of property which should have been sold separately." This objection is disposed of at page 658, the court merely observing: "we cannot perceive any irregularity or illegality in the appraisement of the property sold; and this ground must be disregarded."

The court decided that there was no irregularity in the appraisement, but nothing more.

III.—The court says: "The property sold in block for a much larger price than its appraisement, which was made separately." *Ergo*, no injury was done.

The injury, on the contrary, is proven, not merely by the fact that bidders were deterred from buying; but, conclusively, by proof unmistakable as to the value of the property. The testimony of Bonnacaze, who was agent of plaintiff to rent said property, shows what the value was by the rent it yielded. (See Rec. p. 26.) If, even in war times, it rented for \$408 a year, when, as is well known, rents here were merely nominal, your Honors must conclude that the property sold for one half its real value. If the sheriff obtained a higher bid than the appraisement, that only proves how loosely and defectively the appraisement was made, a circumstance not unusual in proceedings by curator *ad hoc*. But if the sale in block is irregular and informal, it is null without reference to the fact of injury; and the only object of proving injury in this case is to make it not only a legal but an equitable one.

IV.—The court is mistaken when it conceived that plaintiff was merely a purchaser of property, subject to a special mortgage with clause *de non alienando*. The plaintiff was the owner previously, but her title was not recorded when the mortgage was executed. The mortgagor, as her agent, made the purchase in his own individual name. (See title deeds, Rec. p. 34.) Her agent, subsequently (in fraud of her rights) executed the mortgage in the furtherance of his own individual affairs. Of course the defendants, as third possessors, are protected by the non-registry; but is it not carrying the doctrine too far to assimilate her strictly to the condition of a mere subsequent third possessor? If, in the meantime, instead of taking a deed of sale from her agent, she had sued in revendication and obtained judgment, the mortgage, unquestionably, would still have remained. But, then, could she have been treated by the mortgagee as a mere third possessor?

Be that as it may, plaintiff stands at least in the shoes of the mortgagor and if he could argue the nullity of the sale, she certainly can also. That is all she attempts to do here. And the question is: can he defeat her rights by not joining her in the action of nullity? If this question is solved affirmatively, then she is at the mercy of her agent, who first violated his trust by taking title in his own name and then mortgaging the property for his own benefit.

Rehearing refused.

No. 1448.—DAVID N. BARROW v. WILLIAM S. PIKE.

Contracts growing out of the use of Confederate Treasury Notes as a medium of exchange cannot be judicially enforced. 19 An. 209, 288, 359, Constitution of 1868, Art. 127.

A PPEAL from the Fourth District Court of New Orleans, *Theard, J.*
A *Pitot and Bright*, for plaintiff and appellant, *Morgan & New*, for defendant and appellee.

Howe, J. The plaintiff sues to recover the sum of \$19,752 91, with interest from September 14, 1863, upon the ground that he was a partner with the defendant and others in certain purchases and sales of sugar from September 29, 1862 to September 14, 1863; that a large profit was made and declared upon the books of the firm; that the share of the plaintiff being the sum mentioned above, was credited to the defendant for plaintiff, and that the defendant withdrew from the firm these funds of plaintiff and has since retained them.

A mass of testimony appears in the record, and numerous questions have been raised by counsel, but the view which we have taken of the case makes it necessary to consider but a single point.

It clearly appears that the whole transaction was conducted in what were called "Confederate Notes." The sugar was purchased with these notes, it was sold for them, and it even appears from the testimony of Crutcher, one of the parties to the alleged partnership, that the amount thus realized in Confederate notes was, at the time of the trial of this case, still in possession of Crutcher & Co., by whom the sales were made.

Even if we admit, therefore, the truth of the allegations of the plaintiff as to the partnership and the profits, we cannot lend our aid to settle disputes in regard to such transactions, and to divide their apparent gains. 17 A. 261, 19 A. 161, 164, 257, 269, 288, 359.

We think this question not only firmly settled in our jurisprudence, but rightly settled. But if there were doubt as to the correctness of this series of decisions, we think this court cannot now enforce the matters of contract disclosed in this case. By article 127 of our present Constitution, all agreements, the consideration of which was Confederate money, notes or bonds, are declared to be null and void; and it is decided that they shall not be enforced by the courts of this State. We think the case at bar is within this prohibition, for the business of the alleged partnership was to acquire and divide Confederate notes, and the foundation of the action is the averment that the defendant has received, and retains, the share of profits accruing to plaintiff.

The judgment of the court *a qua* was in favor of defendant.

It is ordered and adjudged that the same be affirmed, with costs in both courts.

Rehearing refused.

Succession of Wm. Samuels, on opposition of G. Heaton, Under Tutor, to account of Natural Tutrix.

No. 1228.—Succession of Wm. SAMUELS, on opposition of G. HEATON,
Under Tutor, to account of Natural Tutrix.

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The tutrix, under an order of the court, filed a final account of her tutorship, which the under-tutor opposed. The district judge dismissed the account and ordered the tutrix to file another within fifteen days. Held that—the account first filed should have been amended and corrected and homologated as thus amended. The under-tutor is not responsible for the expenses of litigations with a tutrix in behalf of minors unless he act in bad faith. 19 An. 153.

A PPEAL from the Second District Court of New Orleans, *Thomas, J., Buchanan & Gilmore*, for appellant. *Breaux & Fenner*, for appellee.

REPORTER. This case was decided in May, 1868, by the Supreme Court organized under the constitution of 1864. A rehearing was granted, and the case was transferred to the present court. On re-examination the decree was changed so as to relieve the under-tutor from the payment of costs.

LABAUVE, J. William Samuels died on the third of September, 1860, leaving a surviving widow in community and four minor children, issue of that marriage. On the — day of August, 1865, the widow entered into a second marriage, and was continued in the tutorship of her children.

On the first of September, 1865, George Heaton, under-tutor, obtained a rule upon the said tutrix and her second husband, James S. Marsden, to show cause on the fifteenth of September, 1865, why they should not render an account of tutorship. This rule was made absolute, and the tutrix and co-tutor were ordered to render an account of tutorship on the first of October, 1865.

A final account was rendered according to an interlocutory order of the court, on the tenth of January, 1866, as follows:

September, 1861—Property of Succession as per former Account.

Cash on hand.....	\$584 87
Furniture, value.....	461 00
Watch.....	75 00
Lots in Greenwood Cemetery.....	75 00
One double-barreled shot gun.....	30 00
Lots of ground in Kennerville.....	400 00
House and lot on Benton street.....	7,000 00
Fifty shares Union Bank stock.....	5,000 00
Twenty-two shares Bank of New Orleans.....	2,200 00
Three notes of George Heaton.....	15,680 34

Total value of succession.....\$81,506 21

July 15, 1863—Amount of interest from George

Heaton on account of his three notes.....	\$2,822 40—34,328 61
One-half of which belongs to the minors.....	17,164 31
Deduct amount of debit of the minors.....	3,847 35
Amount of minors' estate in property and cash as shown above.....	<u>\$18,316 96</u>

Succession of Wm. Samuels, on opposition of G. Heaton, Under Tutor, to account of Natural Tutrix.

On the sixteenth of January, 1866, the under-tutor opposed this account:

"Notary's fees \$25, for holding a family meeting, and \$200, fees paid Buchanan & Gilmore charged entirely to the minors, when it should be one-half; and the following amounts received by the tutrix not accounted for:

"Rent from Benton street house from first of February, 1861, to thirtieth of September, 1862, \$1,200; dividends on twenty-two shares of stock, Bank of New Orleans, \$176; dividends on stock, Union Bank, \$400; rents of house on Benton street from thirtieth of September, 1862, to April or May, 1865.

"The house on Rampart street and that on Erato street have been rented since their purchase, and no account is given of the revenues thereof.

"The lots in Kennerville have been rented or might have been rented."

The opposition concludes by praying that this amount be rejected, and that the tutrix and co-tutor be ordered to file a new account according to law, and to give security for their faithful administration.

The judge gave a long decision, and concluded by decreeing that this account be rejected, and that the tutrix and co-tutor be ordered to render a full and detailed account of tutorship within fifteen days.

The accountants and defendants took this appeal.

We are of opinion that our learned brother below erred in rejecting the account in toto. This account should have been amended, as the tutrix improperly charges herself with \$2,822 40 interest on money due by Heaton, and accrued during her widowhood, and also as she credits herself wrongfully against the minors with their board and tuition during the same time. The widow was usufructuary of the shares of her children in the community up to her second marriage. Acts of 1844, p. 99, section 2. Therefore these interests were her property. The charge of \$3,600, made against the minors for their board and tuition, when they had no revenue and pending the usufruct, is improper in this, that there were no means to pay such expenses except from the capital, and the tutrix does not pretend or show that she was authorized to touch the capital of the minors. C. C. Art. 343. The other charges made against the minors must be rejected for the present, to wit: Notary's fees for holding a family meeting, \$25; Buchanan & Gilmore, \$200; Clerk's fees, \$22 35. Nothing shows what they are for, and we see similar charges made to the succession in a former account.

The opposition is untenable. All the house rent, dividends on bank stock, and lot rent accrued during the usufruct, belong to the usufructuary. Besides, the house on Rampart street, and that on Erato street, which she purchased since the death of her first husband belong to her and not to the succession, nor to the minors, notwithstanding she may have paid with money derived from the succession.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and proceeding to render such judgment as

Succession of Wm. Samuels, on opposition of G. Heaton, Under Tutor, to account of Natural Tutrix.

the court below should have rendered. It is further ordered and decreed that the oppositions be dismissed. That the interest of two thousand eight hundred and twenty-two dollars and forty cents received of Heaton and charged to the tutrix, and the amount of three thousand eight hundred and forty-seven dollars and thirty-five cents charged to the minors for their board, tuition, etc., be rejected from said amount, reserving to the tutrix to show hereafter at proper time, the propriety of the notary's fees, twenty-five dollars; Buchanan & Gilmore's fees, two hundred dollars; and the clerk's fees, twenty-two dollars and thirty-five cents; reserving to the parties their respective claims to revenues, interest of money and rents, and for support and tuition of the minors, accrued subsequently to the expiration of the usufruct. And that the account thus corrected and amended, and showing an amount of thirty-one thousand five hundred and six dollars and twenty-one cents in value of property and money received, one half of which belongs to the minors, be homologated.

It is further ordered and decreed that the plaintiff, George Heaton, under tutor, pay the costs of the opposition below and those of appeal; and the defendants and appellants all the costs below, other than in the opposition.

ON REHEARING.

HOWELL, J. A rehearing has been granted in this case to the under-tutor on that portion of the former decree of this court, which condemned him to pay costs of his opposition in the lower court and those of appeal.

In the case of *Lacey v. Lanoux*, 19 A. 153, the principle was recognized that an under-tutor is not responsible for the expenses of litigation with a tutrix in behalf of minors, unless he act in bad faith, but that the minors or their estate must bear such expenses. In this case no bad faith exists on the part of the under-tutor. On the contrary, the opposition made by him seems to have resulted somewhat to their advantage.

It is therefore ordered that so much of the decree rendered herein by this court, on the eighteenth of May, 1868, as condemns "George Heaton, under-tutor, to pay the costs of the opposition below and those of appeal," be set aside, and that said costs be paid by Mrs. M. A. Marsden and her husband, J. S. Marsden, in their capacity as tutrix and co-tutor of the minor heirs of Wm. Samuels, and that in other respects said decree remain undisturbed.

State of Louisiana, ex rel. Francis Sternberg v. Cleophas Lagarde.

No. 1921.—STATE OF LOUISIANA, ex rel. FRANCIS STERNBERG v. CLEOPHAS LAGARDE.

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To entitle a party to an appeal it must appear that the amount in controversy exceeds five hundred dollars. Constitution of 1868, art. 74. *Meyers v. Mitchel*. 20 An. 533.

The right to an office cannot be inquired into under a proceeding by mandamus. Only the right to the possession of the books, papers, room, keys, etc., can be made the subject of inquiry under this writ. 4 N. S. 623, 12 An. 719, Acts of 1868, p. 71, 199 and 220.

APPEAL from the parish of Lafourche, *Train, J. Bush & Goode*, for relator.

LUDELING, C. J. The petitioner, alleging himself to be the *de jure* and *de facto* sheriff of the parish of Lafourche, applied to the judge of the Third Judicial District for a *mandamus* to compel his predecessor in office to deliver to him the "room, keys, papers, records, books, documents and other things appertaining to the office of sheriff."

A peremptory mandate was issued, ordering the party to do what was demanded of him.

From this order the defendant has appealed. Even if the defendant had such an interest in the matter in contestation, to wit: the possession of the "room, keys, papers," etc., belonging to the office, as to authorize him to take an appeal from the order, it does not appear from the records that their value exceeds five hundred dollars. This court is without jurisdiction, *ratione materia*. Constitution of 1868, art. 74. *Myers v. Mitchel*, 20 An. 533.

It is true, it is alleged, that "the office of sheriff" is worth over five hundred dollars. But the "matter in dispute" is not "the office of sheriff," but "the room, keys, papers," etc., belonging thereto. The right to an office cannot be tested, under existing laws, on an application for a writ of *mandamus*. 4 N. S. *Lafitte v. Duncan*, 623; 12 An. 719; acts of 1868, pp. 220, 71 and 199.

It is therefore ordered, adjudged and decreed that the appeal be dismissed at the costs of the appellant.

No. 1410.—BANK OF WEST TENNESSEE v. CITIZENS' BANK OF LOUISIANA.

Contracts or transactions, the basis of which was Confederate Treasury notes, cannot be judicially enforced by the courts of this State. 19 An. 161, 164, 186, 196, 269, 288, 359, 432, 464; constitution of 1868, art. 127.

APPEAL from the Fifth District Court of New Orleans, *Leaumont, J. Hays, Adams & Moise*, for appellees. *A. Pitot*, for appellant.

WYLY, J. Plaintiff has instituted this action against the defendant to recover a large cash balance for deposits and collections by the defendant, the Citizens' Bank of Louisiana, for and on account of plaintiff, the Bank of West Tennessee, during the year 1862.

Bank of West Tennessee v. Citizens' Bank of Louisiana.

Defendant sets up in answer that the transactions between the parties were in Confederate States Treasury notes, and that on the tenth of September, 1863, the amount claimed by plaintiff was paid over to the United States Quartermaster in obedience to general orders No. 202.

On the trial in the District Court there was judgment in favor of plaintiff for \$90,887 22 with eight per cent. interest thereon from tenth September, 1863, and costs.

Defendant has appealed.

In the investigation of this case the first important question presented is: Was the transaction between the plaintiff and defendant based upon Confederate Treasury notes?

Plaintiff has filed in this suit the account current of defendant, extending from seventeenth of March, 1862, to eleventh of September, 1863; plaintiff's witnesses state that this account current is correct, and that it was sent to plaintiff by the defendant under cover of a letter dated May 2, 1865, which is also filed. There are several enteries in this account of Confederate Treasury notes. We have observed a very large debit of \$200,000 entered in that account on twenty-sixth May, 1862. Plaintiff's action seems to be based upon that account to recover the balance due thereon. It is true that the record discloses no positive proof that defendant was instructed to collect the drafts in Confederate States Treasury notes, but a careful examination of the record satisfies us that plaintiff knew that his transactions with defendant were on a basis of Confederate notes. This large entry of \$200,000 in the account is explained by the correspondence of Mr. Rousseau, the cashier of the Citizens' Bank, with Mr. May, the cashier of the Bank of West Tennessee.

On twentieth of May, 1862, Mr. Rousseau wrote: "As you have in our hands a large amount of currency deposits, without being able to bring it back, we think it more prudent on both sides, to send you by the bearer, L. E. Simonds, Esq., *a large portion of said funds*; the balance may be sent to you in the same manner if you desire it, on which please instruct us by return of Mr. S."

On twenty-fourth of May, 1862, Mr. May, the cashier of Bank of West Tennessee, replied: "I have received your favor of twentieth, per Mr. L. E. Simonds, together with \$200,000 treasury notes, placed to credit of your account. I have a good many checks out which may pass through the lines or may be held, should I not be able to take them up here. I have not charged you with any of my collections for some time; do not send me the balance; our paper past due you will hold, as I fear to take the risk of transmission."

By this correspondence, it appears that there could have been no misunderstanding between the parties as to what was meant by the expression of "currency deposits," because on twenty-fourth of May, 1862, the plaintiff was in possession of the letter of defendant, stating

"you have in our hands a large amount of currency deposits. We think it more prudent on both sides to send you, by Mr. Simonds, a large portion of *said funds*. Plaintiff received, without objection, from Mr. Simonds, the \$200,000, Confederate States notes, knowing that they were a "*a large portion of said funds*." What does the expression in plaintiff's letter, "do not send the balance," mean? "I have received your favor of twentieth per Mr. L. E. Simonds, together with \$200,000, treasury notes;" "do not send the balance." The balance evidently meant the amount of treasury notes remaining in the hands of defendant.

Why did plaintiff wish to hold the balance? Because there were checks out drawn against this currency deposit which might pass through the lines. Plaintiff had frequently sent packages of Confederate States notes, as well as drafts for collection, to defendant.

On the first of February Mr. May, the cashier of Bank of West Tennessee, wrote to Mr. Rousseau, cashier of the Citizens' Bank: "Our president, T. O. Nelson, Esq., leaves for your city to-morrow, and will be there several days. By him I send a deposit of treasury notes, \$100,000. Against these deposits plaintiff drew various drafts, payable in *currency*."

When defendant became uneasy and desiring to relieve themselves from so much responsibility, they sent \$200,000 in treasury notes to plaintiff and offered to send them the balance, but plaintiff instructed them to hold on to the balance to meet some checks that they had drawn against these funds which might pass the lines.

On the tenth of March, 1862, plaintiff sent to defendant for collection a check on the Union Bank for \$58,416 19, payable in Confederate notes.

It appears that all the deposits and collections were kept in the same account, and from the correspondence of plaintiff we infer that monthly accounts had been rendered by defendant to them. When plaintiff sent the coupons of Confederate bonds to defendant for collection, he wrote "as this interest is payable in coin, you will so oblige me as to collect and send me the coin by express."

From a careful examination of the evidence, we are satisfied that the collections made by the defendant for the plaintiff were in Confederate notes, and that plaintiff was aware thereof, that this action is based upon transactions in Confederate Treasury notes.

Under the constitution of 1868, the courts of this State cannot entertain an action based upon transactions in Confederate Treasury notes.

We think the evidence discloses that this case is founded upon dealings in an unlawful currency, and this court has often refused to lend its aid to transactions reprobated by law.

It is therefore ordered, adjudged and decreed that the judgment of the court below be avoided and annulled; and it is now ordered that there be judgment in favor of defendant, dismissing this action at plaintiff's costs in both courts.

Rehearing refused.

Alfred Penn v. Kearny, Blois & Co.

No. 1426.—ALFRED PENN, Appellee, v. KEARNY, BLOIS & Co., Appellants.

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49	1554

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50	384

Where a party has leased, for a given time, certain described premises, including several houses and lots of ground in the city of New Orleans, and a fire breaks out which destroys the buildings on a portion of the leased premises, the lessee has the option under art. 2607 of the C. C., to demand a revocation of the entire lease or a diminution *pro tanto* of the rate. He cannot retain the portion of the leased property unaffected by the fire and have the lease revoked as to that which was destroyed.

Where the evidence shows that a commercial firm have enjoyed the benefits of a lease that has been made to and in the name of one of the members of the firm, they will be held liable *in solido* for the rent of the property leased.

Evidence to show that the firm name was marked on goods deposited in the warehouse is admissible in a suit by the lessor to recover the rent.

APPEAL from the Second District Court of New Orleans, *Thomas, J.*
Wm. H. Hunt, for appellee. *George L. Bright*, for appellants.

HOWE, J. This suit is brought to recover \$6,184 98 for rent of a warehouse and adjacent lots, let by plaintiff to Alfred Kearny, the obligations of which hiring, it is alleged, were assumed by the defendants as a commercial firm. The rent is claimed from July 1, 1861, to November 1, 1862. The defendants gave their notes, in their firm name, for a portion of the rent up to November 1, 1861, and four of these rent notes, amounting, with costs of protest, to \$1,439 98, form part of the sum sued for. The balance, \$4,700, is for rent from November 1, 1861, to November 1, 1862.

The defendants, admitting the execution of the leases and rent notes sued on, acknowledged an indebtedness of \$615 94 for rent to August 24, 1861, and deposited that sum in court. They further averred "that on the twenty-fourth of August, 1861, the buildings and improvements belonging to plaintiff, upon the property leased, were destroyed by fire, and the lease became canceled and annulled by the effect of law, and the revocation of said lease demanded by the lessor."

The case was tried before a jury, who rendered a verdict for the sum claimed, less the amount paid into court, and the sum of \$700 as diminution of the rent; and from a judgment on this verdict, the defendants, after applying without success for a new trial, have appealed.

It appears that on the ninth of July, 1853, plaintiff leased to Alfred Kearny two of the lots and the warehouse, for \$150 per month, from November 1, 1858, to November 1, 1859; that on the fifteenth of February, 1859, he leased to the same a large lot lying next below the warehouse, and also another lot on Julia street, to first of November, 1859, at \$130 per month; that on the twenty-fourth of February, 1859, the plaintiff and Mr. Kearny executed a written instrument, in which, after reciting the foregoing leases, they express themselves as follows:

"Now, then, Alfred Penn and Alfred Kearny have this day entered into a contract of lease for the whole of the aforesaid property, measuring in the aggregate about two hundred and fifty-seven feet front

Alfred Penn v. Kearny, Blois & Co.

on Magazine street, and about eighty-nine feet fronting on Julia street, running back to the lots fronting on Magazine street, and forming a key to the same, viz: Alfred Penn releases to Alfred Kearny all of the said property for the term of three years from the first day of November next, 1859, to the first of November, 1862, the same being renewed with all the conditions and privileges recited in every particular in the two aforementioned leases, with the exception of the price, which is hereby consolidated, and agreed upon at the rate of forty-five hundred dollars per annum to commence from the first day of November next and payable monthly, say \$375 per month, said lessee agreeing to grant his rent notes each year in advance for the same, say twelve notes of \$375 each."

In consideration of certain improvements made by plaintiff, the rent was further increased to \$4,700 per annum.

On the twenty-fourth of August, 1861, a fire occurred on the lot lying next below the warehouse, on Magazine street, and a shed, fifty-four feet long and forty-seven feet wide, in the rear corner of that lot was destroyed. The defendant, Kearny, ten days after, sent the following letter to plaintiff:

" Mr. Alfred Penn:

" *Dear Sir*—A portion of the buildings upon the premises situated on Magazine and Julia streets, which I rented from you, having been destroyed by fire, I now notify you that I demand a revocation of the lease, and am no longer the lessee of the premises. The merchandise now on the premises will be removed therefrom as soon as possible, not, however, before paying the rent due, which we are ready to pay on demand.

" ALFRED KEARNY.

" NEW ORLEANS, September 3, 1861."

The letter was sent at a time when plaintiff was absent from the city, and it appears that about November 7, 1861, he notified defendant, Kearny, that he did not recognize the right of revocation, and offered to rebuild the shed. The shed was, in fact, rebuilt about February 25, 1862; and it was for the seven months elapsing from the time of the fire to the time of the completion of the new shed that the jury allowed the diminution at the rate of one hundred dollars per month—a sum apparently about equal to the proportion of rent for the whole lot on which the shed stood.

The shed which was burned covered an area of about two thousand five hundred square feet; the lot on which it stood contained about twenty-one thousand square feet; the whole property leased, including warehouse and adjoining lots, contained upward of fifty thousand square feet. The defendants continued to occupy the warehouse, the upper Magazine street lot, and the Julia street lots; at least there is neither allegation nor evidence that they abandoned them. As for the lot on which the burned shed had stood, the letter of Kearny of September 3, 1861, shows that they were still in occupation ten days after the fire,

Alfred Penn v. Kearny, Blois & Co.

and, though mention is made of an intention to remove, there is no satisfactory evidence to show that they ever did really remove, and the burden of proof was certainly on them. There is evidence furnished by plaintiff, to show that they occupied the lot on which the shed was burned until some time after the shed was rebuilt.

But even if we admit the positions of defendants that the agreement of February 24, 1853, was the only contract in force at the time of the fire; that the destruction of the shed gave to defendants, under article 2667, C. C., the option to cancel the lease or to demand a diminution of rent, and that the defendants did remove from that portion of the premises on which the fire occurred, it is still difficult to perceive how the claim of cancellation of the whole lease and discharge from the obligations to pay any rent after the fire, can be allowed. If the defendants had surrendered to plaintiff the whole premises, our conclusions might have been different, though even in such case it must be remembered that our laws do not favor the abrogation of leases where the lessor is not in fault. 6 A. 279; 12 A. 823; 17 A. 322. But when we find them remaining in possession of the principal portion of the object of lease, we must conclude that the diminution of rent allowed by the jury was an ample satisfaction of any right the defendants had under the circumstances.

In this connection we have been referred by defendants to a passage from Marcade, volume 6, p. 448. The author is commenting upon article 1722 of the Code Napoleon, the equivalent as to this case, of article 2667 of our Civil Code, and says:

“La destruction partielle donne au locataire le choix de le resellier, ou de le continuer sur ce qui reste avec diminution du prix; le simple endommagement ne permet la résiliation ne a l’une ni a l’autre des parties, et oblige seulement le bailleur a reparer le degat pour remettre la chose en bon etat.”

The doctrine quoted seems to be in favor of plaintiff rather than defendants, admitting that the destruction of the shed was such a “destruction partielle” as to give the lessee the choice of canceling the lease or of continuing to occupy the remainder of the buildings, “*ce qui reste*,” at a reduced rate. It is evident he cannot do both. If he cancel the lease he must give up the whole property. If he “continue to occupy what remains with diminution of rent,” he cannot cancel the lease. A right of choice between two methods is not a right to adopt both.

It is contended by the counsel for defendants that there is error in the judgment because it is rendered against them *in solido*; that the lease is signed by Alfred Kearny; that there is no evidence to make the firm of Kearny, Blois & Co. responsible; and that if there be any, there is none to show that the firm is a commercial firm so as to bind the members *in solido*.

In *Reynolds v. Swain*, 13 La. 197, it was held by this court that where one of the defendants, sued as commercial partners, hired the premises in his individual name, but that the store was occupied until abandonment by the partnership, the latter circumstance showed that the contract was made for the affairs of the partnership, and the firm was there-

 Alfred Penn v. Kearny, Blois & Co.

fore bound by the act of the partner, lessee, though made in his individual name. The case at bar is, perhaps, a stronger one in favor of plaintiff, since the firm of Kearny, Blois & Co., furnished rent notes under the lease of February 24, 1859, the one specially pleaded in the answer, occupied the premises as we have seen, admitted in their answer the execution of the rent notes, made tender of the rent up to the time of the fire, and finally prayed that the lease might be annulled and canceled, and that the notes described in plaintiff's petition be surrendered to the respondents."

And we think it abundantly shown that the defendants' firm was a commercial partnership. The allegation that it was is not specially denied. We find from the evidence that the firm carried on their business in the leased premises, had a stock of merchandise there, and that the merchandise was insured as such in the firm name. It will hardly be contended that such a business is not commercial.

The defendants reserve a bill of exceptions to evidence introduced by plaintiff that the defendants, in their firm name, were insured upon their stock of merchandise and upon a shed on the leased premises.

The evidence was offered to prove the occupancy of the premises and the ownership of goods in them by the defendants during the time for which rent is claimed, and in this view is unobjectionable.

For the reasons given, it is ordered and adjudged that the judgment appealed from be affirmed with costs.

Rehearing refused.

21	24
44	594

No. 1449.—CYRUS W. FIELD & CO. v. NEW ORLEANS DELTA NEWSPAPER COMPANY.

The holder of negotiable paper must, in order to bind the indorser, give notice of non-payment by the maker in conformity with the rules prescribed by the law merchant.

The doctrine on which the necessity of notice to the indorser rests, is the presumption of damage or injury in his favor.

Whoever is entitled to a recourse over against another party, is presumed in law to be injured by a delay in receiving notice of non-payment.

A PPEAL from the Second District Court of New Orleans, *Thomas, J. W. W. Handlin*, for appellants. *H. J. Leovy*, for self and *D. Da Ponte, Rozier and Buchanan & Gilmore*, for Mrs. Bonford, appellees.

HOWELL, J. As stated by counsel for plaintiffs and appellants, the only question presented on this appeal is: Are the members of the New Orleans Delta Newspaper Company, who indorsed the notes sued on, liable without notice of dishonor?

The notes are made by H. J. Leovy, business manager, to his own order and indorsed by him individually and before delivery to plaintiffs, the first holders, by D. Da Ponte and P. E. Bonford, all three of whom were members of the company.

It is urged by plaintiffs that these parties are mere sureties, and not entitled to notice, and in support of this position they rely on a doctrine in the case of *Crane, executor, v. Trudeau*, 19 A. 308, in the following words:

Cyrus W. Field & Co. v. New Orleans Delta Newspaper Company.

"In relation to third persons and *bona fide* holders, the obligations of accommodation indorsers are coextensive with those of indorsers of business paper. *It would be different if the transferee of a note indorsed gets it from the maker. In such a case the indorser would be a surety.*"

The latter doctrine, not being essential to the decision in that case, may be regarded as *obiter*; but whether a correct law or not, it cannot apply in this case, when the note is duly *indorsed* by the payee (who is not the holder), and the subsequent indorsers thus making it, on its face, commercial paper, and the evidence shows that the defendants intended to bind themselves as *accommodation indorsers*, and it seems to be settled here, at least since the case of *Weaver v. Murrell*, 12 A. 517, that although they may, in some sense, be sureties, they are entitled to notice. We must view them as accommodation indorsers, whose liability *depends* on the rules applicable to negotiable instruments in general, and consequently the holder must take the steps necessary to bind any indorser of business paper according to the law merchant. They were parties to the notes when received by the plaintiffs. See *Story on Notes*, §§ 134, 263, 288, 292, 295, 367, 479, 480; 6 N. S. 517; 12 R. 183; 10 A. 93; 12 A. 517; 14 A. 305; 16 A. 103.

In the case of *Keeler v. Bartine*, 12 Wendell 118, it is said that "the circumstances that the indorser is an accommodation indorser adds cogency to the considerations in favor of strict notice of the default."

The doctrine on which the necessity of notice rests seems to be the presumption of damage or prejudice in favor of the indorser, who is entitled to a recourse over against another party. In other words, whoever is entitled to a recourse over against another party is presumed in law to be injured by a delay in receiving knowledge of non-payment—is therefore entitled to prompt notice. *Chitty on Bills* 435.

In this case the indorsers, if notified in due time, may have secured themselves against, or obtained payment from the maker.

The plaintiffs contend, however, that the New Orleans Delta Newspaper Company was a mere private partnership, and its members not being permitted to plead ignorance of their own affairs, must be held to know that the notes were not paid, that the maker knew it, and notice to one was notice to all.

The reply to this is that plaintiffs have introduced in evidence *the charter*, which shows that none of the stockholders had any control of, or anything to do with the business, except Leovy, the business manager, and that knowledge is not necessarily notice. The notes were made payable at the Canal Bank, and although Leovy, as business manager, may have known that they were not paid, he did not, therefore, know, without legal notice from the holder or other proper party, that he would be looked to for payment as indorser. See 1 *Parson on Notes and Bills* 521, 525, 526 and 629.

The judgment was correctly rendered in favor of the indorsers.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

Villeneuve Leblanc, Jr. & Co., v. L. E. Perroux, Marsoudet, subrogated.

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44 387

No. 1431.—VILLENEUVE LEBLANC, JR. & CO., v. L. E. PERROUX, MARSOUDET, subrogated.

A judgment rendered against a party who has neither been cited nor made an appearance by answer, is an absolute nullity.

Proof of citation can only be shown by the Sheriff's return, and nothing can be presumed by the Court.

The Sheriff's return on a citation cannot be amended or corrected after judgment, so as to cure nullities resulting from a defective citation.

The power to receive citation for another must be express and special; it cannot be conferred by a general mandate. C. C. 2965, 2966.

When parties have elected a domicile as a place to receive citation, the Sheriff's return must show that the service was made at the elected domicile in the manner prescribed by law.

Citation served on a person not a party to the suit, whom it is neither alleged nor shown was the agent of the principal, is defective, and judgment rendered thereon is null and void.

A PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. H. & J. Grover*, for appellants. *L. Castera & C. Hunt*, for appellee. **HOWE, J.** This is an action of nullity.

The judgment sought to be annulled was rendered in a suit upon four promissory notes made by Villeneuve LeBlanc, Jr. & Co., of the parish of West Baton Rouge, who, in an act granting a mortgage upon their plantation situated in the parish of West Baton Rouge, to secure these notes, consented as follows:

"That all proceedings may be instituted in and carried on to final judgment and execution before any of the district courts, or other courts of competent jurisdiction in this city (of New Orleans), electing the office of Bellocq, Noblom & Co., or that of their successors, in this city, for their domicile, and renouncing the benefit of any laws now in force or hereafter to be enacted, providing that the defendants can only be sued or proceeded against before the judge of the district or parish wherein they reside or have their domicile."

In this action upon the promissory notes, commenced in the Sixth District Court of New Orleans, the return upon the citation was the following:

"Received February 16, 1865, and on the same day served a copy of this citation and accompanying petition on A. P. Noblom, agent of Villeneuve LeBlanc, defendant herein, personally."

Upon this return judgment by default was entered, and in due time the default was confirmed and judgment rendered against Octave LeBlanc and Villeneuve Le Blanc, composing the firm of Villeneuve LeBlanc, Jr. & Co., *in solido*, for the sum of \$16,000, with sundry arrears of interest, and with privilege on the property mortgaged.

Steps having been taken to execute this judgment, the plaintiffs in the case at bar commenced their action of nullity upon the ground of defective citation, and invoked the conservatory remedy of injunction. The defendants (appellees) appeared and answered, and moved to dissolve the injunction upon the ground, substantially, that the judgment debtors had been properly cited, and that the citation and return

Villeneuve Leblanc, Jr. & Co., v. L. E. Perroux, Marsoudet, subrogated.

formed a legal basis for a judgment. The judge *a quo* denied this motion, being of opinion that the service of the citation, as disclosed by the return we have quoted above, was not a compliance with the law, and amounted to no citation at all.

The defendants in injunction thereupon procured an order permitting the return of the sheriff in the case of *Perroux v. Le Blanc* to be amended as follows:

- “In conformity to the ruling of the court, permitting an amendment to be made to the service of the above citation, I now make the following additional return and amendment, to wit: that on the day named in the said return I served a copy of this citation and accompanying petition, as in said return set forth, by serving the same on A. P. Noblom, personally, who at the time I served him was in his counting room or office, being that of Bellocq, Noblom & Co., No. 61 Carondelet street, in second floor of said building, first district of New Orleans, November 16, 1866.”

The case came on to be tried and the court *a quo* gave judgment for plaintiffs, but thereafter granted a new trial, and upon the second trial gave judgment for the defendants, dissolving the injunction with damages.

From this judgment the plaintiffs have appealed.

It is well settled that a judgment rendered against a party who has neither been cited nor appeared, is an absolute nullity; that a court can presume nothing with respect to a party being cited; that nothing will cure defect of citation or want of service except appearing and answering to the merits; that the proof of the service of a citation is not a matter *en pais*, and there can be no evidence of it but the sheriff's return, unless service be waived by the appearance of the party; that the service must appear by matter of record, and no parol evidence can be received. C. P. Art. 206; *Harris v. Alexander*, 1 Rob. 30.

Tested by these elementary rules, the citation in the case of *Perroux v. Le Blanc* as evidenced by the original return was clearly defective. There is no allegation of agency in the petition; and admitting that LeBlanc, Jr. & Co., in electing as their domicile the office of Bellocq, Noblom & Co., in New Orleans, elected it as a place to receive citation, it does not appear by the original return that the service was made at this elected domicile, nor does it appear that the service was made upon a person apparently above the age of fourteen, living in the house.

C. P. 189, 201; 16 L. 570: 12 L. 547.

The defendant seeks to avoid these conclusions by contending that the election of the office of Bellocq, Noblom & Co. as a domicile was a mandate to this firm, and each of its members to accept service of citation. In support of this position his counsel have cited French commentaries and decisions on article 111 of the Code Napoleon, and have urged that although that article is not to be found in our Civil Code, yet its equivalent is to be found in C. C. Art. 11.

Villeneuve Leblanc, Jr. & Co., v. L. E. Perroux, Marsoudet, subrogated.

Granting that the eleventh article of our code authorizes, in general terms, the election of domicile, which is specially authorized by the 111th article of the Code Napoleon, and conceding the highest respect to the commentators and courts of France, we are of opinion that the law of Louisiana has been long settled adversely to the view urged by the defendant. The power to receive citation for another is not one of administration. It cannot be confessed by a general mandate, however broad. It can result only from the express terms of an instrument, or from such language therein as leaves no room for doubt.

C. C. 2965, 2966.

The case of *Fuselier v. Robin*, 4 An. p. 61, will show how jealously the court has guarded the rights of parties defendant in this respect.

There being therefore in the petition in *Perroux v. LeBlanc* no allegation that A. P. Noblom was agent of defendants, and no evidence of agency, the case at best is one of an attempt to serve defendants with citation at their elected domicile, and the original return does not show that this service was made in any lawful way.

But the defendant contends that he caused the return to be amended as stated above; that such amendment was properly allowed by the court, and that any defects which may have existed in the judgment were thus cured. It is quite true that a sheriff's return upon certain writs may be amended at any time, and ought to be in deference to truth and justice, but there is an obvious distinction in this regard between process which issues before judgment and forms the foundation thereof, and process which issues after a judgment by way of execution. The former cannot after judgment be amended in such way as to render valid a judgment otherwise null. As was well said by plaintiff's counsel in argument, if a house be built without a foundation it will be of little use afterwards to lay a foundation on the roof. And this distinction borne in mind will explain what at a superficial glance might seem a conflict between such a case as *Hatton v. Stilwell*, 10 M. 91, and such cases as *Auber v. Bukler*, 3 N. S. 489, and *Elmore v. Bell*, 2 R. 485. In the language of this court in *Rochelle's heirs v. Cox*, 5 L. 287—"The return of a process, being the basis, the foundation, on which the judgment rests, it is clear that it must be amended, if amended at all, before judgment; for after it, the foundation of it cannot be subtracted. It is otherwise as to returns posterior to the judgment, like that in an execution. To such a return the rule in 10 Martin 91 cannot be said to be applicable."

We think, then, that the judgment in question in the case at bar must rest on the facts evidenced by the original return, and for the reasons given above must be annulled. If, as matter of fact, the citation was proper, the defendants herein can still proceed to perfect a judgment in the case, since the present judgment being annulled there can be no objection to such amendment of the return as will make it conform to the truth.

Villeneuve LeBlanc, Jr. & Co., v. L. E. Perroux, Marsoulet, subrogated.

It is, therefore, ordered and adjudged that the judgment appealed from be avoided and reversed, and that there be judgment in favor of the plaintiffs against the defendant, avoiding and annulling the judgment of the Sixth District Court of New Orleans, in favor of L. E. Perroux v. Villeneuve LeBlanc, Jr. & Co., in the case numbered 13,927 of the docket of said court; that the order of injunction issued herein on the sixth February, 1866, be made perpetual, and that the defendant pay the costs of both courts.

Rehearing refused.

NO. 1432.—A. GLENN, v. THOMPSON & BARNES.

A held B's note; B sold a bill of goods to C, who represented himself as the agent of A, and promised that the amount of the bill should be credited on the note. A brought suit on the note, and B pleaded the account as an offset against the note. The evidence did not show that C was the agent of B, nor that A received the goods or ratified the purchase. Held that—the account could not be pleaded as an offset, or payment *pro tanto* of the note. Where the appeal is purely frivolous, damages will be awarded the appellee as in case of a frivolous appeal.

APPEAL from the Fourth District Court of New Orleans, *Theard*, J. *Charles E. Fenner*, for plaintiff and appellee. *Edward W. Huntington*, for defendants and appellants.

WYLY, J. This action is based upon two promissory notes by defendants. The defense is a general denial, that plaintiff is not the owner of the notes sued on, and that defendants have paid \$1,310 73 on these notes. On the trial, defendants offered an account for \$181 for goods sold the plaintiff as an offset, which was allowed without objection; they also offered an account of \$277 64 for goods sold Dr. J. W. Glenn as agent of A. Glenn, as an offset; there was judgment in favor of plaintiff for the amount claimed, subject to a credit of \$181; and the defendants have appealed.

Defendants claim in this court that the account of \$277 64 for goods sold by them to Dr. J. W. Glenn as agent of plaintiff should be allowed as an offset or credit. There is no other defense set up.

The only proof in support of this account is the evidence of Edward Thompson (one of the defendants), who says that Dr. J. W. Glenn, representing himself as agent of A. Glenn, purchased from the defendants the goods stated in the bill, "agreeing that the amount of said bill of goods should be credited on the notes sued on, on which express agreement the goods were sold to him."

It was not alleged or proved that Dr. J. W. Glenn was the agent of the plaintiff, A. Glenn, in making said purchase, or that A. Glenn ever received said goods or knew anything of their purchase.

A. Glenn v. Thompson & Barnes.

We think the District Judge very properly refused to allow this account of \$277 64 as a credit, and that the appeal in this case is purely frivolous. Plaintiff has claimed damages for this frivolous appeal and we think they should be awarded him. It is therefore ordered and decreed that the judgment appealed from be affirmed with costs, and that plaintiff recover of defendants one hundred dollars damages for frivolous appeal.

21	30
44	310
21	30
48	800
21	30
119	227

No. 4436.—Widow of CHARLES DUMONCHEL, Tutrix, etc., v. THOMAS LEMERICK.

A motion to dismiss an appeal for reasons that are purely technical, such as informalities in the citation and service of appeal, must be made within three judicial days from the filing of the transcript.

Where a promissory note has been suffered to prescribe on its face, and no sufficient showing is made by the holder that prescription has been interrupted, the plea will be maintained. 20 An. 161, 665.

APPEAL from the Second District Court, parish of St. Bernard, *A. Cazabat, J. Joseph Marcel Ducros*, for appellant. *Belden & Fuselier*, for appellee.

WYLY, J. Defendant has filed a motion to dismiss this appeal on the following grounds:

First—Because the citation of appeal is defective in this, “it does not purport to have been issued in the name of the State of Louisiana,” “it is not sealed with the seal of the court,” it was not served on appellee by the sheriff of the parish where he resided at the time, and it does not specify the number of days given appellee to answer, etc.

Second—Because the certificate of the clerk to the transcript is defective in this, no mention is made in it that the transcript contains copies of all the documents filed in the case.

Third—Because the amount in controversy is less than \$500.

The transcript was filed in this court on the twenty-first day of June, 1867, and the motion to dismiss was filed on the twenty-first December, 1868.

The defendant does not deny that he was cited, but sets up objections to the form of the citation and the service, which we regard as purely technical and should have been made within three judicial days after the transcript was filed.

On motion of appellant’s counsel the clerk of the district court was permitted to correct his certificate, and the same, drawn up in proper form, was filed in this case on sixteenth January, 1869, which removes the second ground for dismissal.

The third ground was not well taken, the amount in controversy being over \$500, including principal and interest up to the filing of the suit.

Widow of Charles Dumonchel, Tutrix, etc., v. Thomas Lamourick.

It is therefore ordered that the motion to dismiss this appeal be overruled.

During the marriage of plaintiff and her husband Charles Dumonchel, she acquired by purchase a small tract of land in the parish of St. Bernard, and afterward borrowed from defendant a sum of money, to secure which she gave her mortgage notes bearing on said property. She signed the notes and executed the mortgage with the written authorization of her husband. The husband afterwards died and the property was inventoried as his property, having been acquired during the marriage.

Plaintiff, widow Dumonchel, was appointed natural tutrix of the minor children of her marriage with her husband.

She executed an act renouncing the community of acquets and gains which had existed between her and her husband Charles Dumonchel.

The defendant took out an order of seizure and sale against the property, proceeding against the widow individually on her notes. It was not taken out against the property as belonging to the succession, nor was notice of the order served upon the widow as tutrix and legal representative of the succession.

In order to prevent the sale of the property, plaintiff in her capacity as tutrix, took out an injunction, alleging that the property seized was part of the succession of Charles Dumonchel, having been acquired during the marriage; that she had renounced the community and only appeared in behalf of the heirs; that the notes in which the order was granted are barred by the prescription of five years, and that the property was exempted from seizure by the Homestead Act, etc.

Defendant's answer admits the property seized was acquired during the community, and belongs to the succession of Charles Dumonchel, for which reason the answer states the defendant "changes the character of his action from executory to ordinary, and prays that the said Mrs. Dumonchel have copies for this answer with petition for order of seizure and sale served on her in her capacity as natural tutrix of her minor children, administering the estate of her deceased husband Charles Dumonchel, and surviving wife and partner in community, and after due and legal proceedings had that he have and recover judgment for the amount claimed in his petition for order of seizure and sale, with full recognition of his mortgage on the property seized, and that it be sold to satisfy the demands in said petition and costs of suit."

On the trial the injunction sued out by plaintiff was dissolved with costs, and she has appealed.

That the order of seizure and sale was improperly granted there can be no doubt. The defendant admits in his answer that the property seized as the separate property of Mrs. Dumonchel was property belonging to the succession of Charles Dumonchel; he abandons his proceeding against her, and declares that he changes his action from executory into ordinary, praying for judgment against the succession, recognizing his mortgage in the property, etc.

Widow of Charles Dumonchel, Tutrix, etc., v. Thomas Lemerick.

His answer virtually admits that his executory proceeding was wrong. If so the injunction was properly taken out.

The defendant had the right to change his proceedings and ask for judgment against the succession for the amount of his claim and for the recognition of his mortgage on the property, and the judge should have granted him judgment as prayed for unless there was some good defense to his demand.

Plaintiff in injunction sets out several grounds of defense, but the most serious one seems to be the plea of prescription of five years.

The notes on which the defendant, Thomas Lemerick, bases his claim were made on twenty-first and twenty-fifth of April, 1860, and payable twelve months after their respective dates. They were made during community, and although in the name of his wife, they were debts due by the community. There was no proceeding against the succession on these notes till they were declared upon by the defendant in his answer filed October 1, 1866, more than five years from the date of their maturity. We have not found in the record any evidence of the interruption of prescription, and we think the plea was well taken.

Having taken this view of the plea of prescription it becomes unnecessary to notice the bill of exception taken by the defendant to the introduction of the mortuary papers of said succession on the ground that there were no stamps thereon, and also there was no evidence in the copy of the act of renunciation that the original was stamped by the notary who passed it, etc.

It is therefore ordered that the judgment appealed from be avoided and annulled, and it is now ordered that the injunction sued out by plaintiff be perpetuated, and that there be judgment in favor of the succession of Charles Dumonchel, dismissing the demand of the defendant Thomas Lemerick at his cost in both courts.

NO. 1423.—CITIZENS' BANK v. ROBERT H. DIXEY.

The only question to be inquired into on appeal from an order of seizure and sale, is whether there was sufficient evidence before the Judge *a quo* to authorize the fiat.

An order of seizure and sale can not be set aside on appeal on account of subsequent irregularities in the execution thereof.

APPEAL from the Third District Court of New Orleans, *Fellowes, J. Armand Pitot*, for appellee. *D. C. Labatt* and *Alexander Walker*, for appellant.

Howe, J. This is an appeal from an order of seizure and sale signed January 4, 1866.

It is well settled that on such an appeal the only question is, whether there was before the Judge *a quo* sufficient evidence to authorize the fiat. The order can not be set aside on appeal, on account of subsequent irregularities in the execution of it, as by not notifying the proper parties or otherwise. *Dodd vs. Crain*, 6 Rob., 60.

We can only inquire, therefore, into the validity of the order and of the many points raised by the appellant; it will be necessary to consider but these two:

1. That the certificate attached to the copy of the act of mortgage on which the order of seizure and sale was granted, was not stamped as required by acts of the Congress of the United States. And
2. That at the time the order of seizure and sale was made the foreclosure of mortgages in Louisiana was forbidden by general orders No. 15, Headquarters Department of the Gulf, series of 1863.

As to the first point, the record shows that the certificate upon the copy of the act of mortgage has no date, while the mortgage itself is dated August 7, 1861. Upon the principle that a sworn officer is presumed to have done his duty until the contrary be proved, we must conclude that this copy was furnished and certificate made before the act in reference to stamped instruments went into effect, that is, prior to October 1, 1862, (United States Statutes at Large, Vol. 12, p. 475,) and therefore required no stamp.

As to the second point. The military prohibition of the foreclosure of mortgages, which is invoked by the appellant, was removed by General Orders No. 113, Headquarters Department of the Gulf, series of 1864, the text of which may be found in full, in the opinion of this Court, in the case of *Graham v. Taylor*, 18 An. p. 656, and of which we will take judicial notice. *Lanfear v. Mestier*, 18 An. p. 497. It is unnecessary then to consider what would have been the effect of order No. 15, if it had remained unrepealed.

We perceive no error in the judgment appealed from, and it is therefore ordered and adjudged that the same be affirmed with costs.

Rehearing refused.

No. 1445—ALFRED MARCHAND v. ROBERT B. BELL and CITY OF NEW ORLEANS and JAMES MCKENZIE.

The service of garnishment process fixes the rights of the seizing creditor from the moment the garnishee makes answer to the interrogatories.

The seizing creditor acquires a privilege on the assets in the hands of the garnishee to date from the service of the interrogatories.

The city of New Orleans was indebted to Robert B. Bell in the sum of \$5,000; James McKenzie had judgment against R. B. Bell, on which he caused a garnishment process to issue against the city; the answers of the city to the interrogatories disclosed its indebtedness to Bell.

A. Marchand brought suit against Bell and made the city a party, which was not served on the city until after the service of the interrogatories in garnishment. Held that Marchand, the plaintiff, was only entitled to recover the balance due by the city to Bell after paying the amount of McKenzie's judgment.

A PPEAL from the Third District Court of New Orleans, *Fellowes, J. G. Schmidt* and *E. W. Huntington* for plaintiff and appellee. *Buchanan & Gilmore* for appellants.

WILY, J. This action is based upon certain orders of Robert B. Bell on the Assistant Treasurer of the city of New Orleans, amounting, in the aggregate, to \$5,140, which were not accepted.

Alfred Marchand v. Robert B. Bell and City of New Orleans and James McKenzie.

Robert B. Bell answered by admitting the claim, but pretending that he had paid it.

The city of New Orleans answered, pleading the general issue, and averring if it ever were indebted to said Bell by reason of any contract or contracts between them, that the same were forfeited as well as any amount that might be due him on account of the failure of said Bell to comply with the terms of said contracts.

On the fifth of September, 1866, the city filed a supplemental answer, repeating the general denial, and averring that since filing the original answer it had made a compromise with Robert B. Bell, and agreed to pay him five thousand dollars in full satisfaction for all his claims; also averring it was "ready and willing to pay the aforesaid sum in full satisfaction of the claim aforesaid to said Bell, or any one duly qualified to receive the same, but cannot do so without a judgment of court, rendered contradictorily with plaintiff in this case, Robert B. Bell, the defendant, William H. Bell, pretending to be the assignee or transferee of said claim of R. B. Bell v. the city and James McKenzie, who has garnished the city." The supplemental answer concludes with a prayer that James McKenzie and W. H. Bell be served with copies of the petition and answer, and be cited to appear in the case and assert their respective claims, and that there be judgment contradictorily with all the parties, declaring how the aforesaid five thousand dollars shall be distributed, and on payment of said sum that the city be released from all further responsibility.

It was admitted on the trial that W. H. Bell had no interest in the matter in question.

James McKenzie answered, alleging that the city owes Bell an amount greatly exceeding the five thousand dollars, and that on the eighteenth of April, 1866, he obtained a final judgment against Robert B. Bell for one thousand eight hundred and eighty-seven dollars and ninety-six cents and interest, and upon said judgment he issued execution, and took out garnishment process against the city of New Orleans, propounding interrogatories according to law, and that said attachment is still in force and effect, and binds the indebtedness of the city to Bell, and entitles him to be paid the amount of his judgment, interest and costs.

On the trial there was judgment against Robert B. Bell for the amount claimed, and it was further ordered that the city of New Orleans pay over to plaintiff, A. Marchand, five thousand dollars, the amount admitted to be due Bell, as contractor, in preference to all other claimants, in part satisfaction of his judgment against Bell. The demand set up by McKenzie was dismissed with costs.

James McKenzie and the city of New Orleans have appealed.

The defendant, Robert B. Bell, has not appealed, and as to him the judgment is now *res judicata*.

The city of New Orleans admits owing Bell the five thousand dollars.

Alfred Marchand v. Robert B. Bell and City of New Orleans and James McKenzie.

and avers that it is "ready and willing to pay the aforesaid sum" to any one qualified to receive the same. It makes no contest in this court as to how these funds shall be distributed, only demanding a full discharge upon payment thereof.

The contest for the funds is therefore between the plaintiff and James McKenzie, who served his garnishment process on the city on the eleventh of May, 1866.

It appears that prior to plaintiff's suit, James McKenzie sued out garnishment process against the city on his execution against Robert B. Bell, propounding interrogatories to the city.

The Mayor's answers not being satisfactory, were excepted to and traversed by McKenzie, and additional interrogatories propounded. On the twenty-ninth of November, 1866, the Mayor, in behalf of the city, answered the additional interrogatories, and admitted that the city had "effected a compromise and full settlement with Bell in full satisfaction for all claims, and whereby the city has promised to pay five thousand dollars," and that proceedings are pending in the suit of A. Marchand v. Robert B. Bell and the city of New Orleans, wherein the said James McKenzie is made party for the distribution of said five thousand dollars.

The rights of James McKenzie were ascertained the moment the city admitted its indebtedness to Bell. He had seized Bell's funds in the hands of the city, and had acquired attaching creditor's privilege thereon from the day the garnishment process was served, which was prior to the action of plaintiff.

Plaintiff had acquired no privilege on the funds of Bell in the hands of the city. He simply sued the city on the orders of Bell which it had not accepted.

We do not find in the record any order consolidating this suit with the garnishment proceedings sued out by James McKenzie against the city of New Orleans; indeed, that suit seems to be still pending in the District Court and not disposed of. At least that case is not now pending before this court on appeal, and we cannot undertake to fix the liability of the city on its answers to the additional interrogatories filed in that case. From the pleadings and evidence in that case, received in evidence on the trial of this cause, without objection, it appears that the funds of Robert B. Bell were attached in the hands of the city of New Orleans on the eleventh May, 1866, prior to the institution of this suit.

But we are at a loss to know in what capacity Jas. McKenzie appears before this court. He has not filed a petition of intervention and caused it to be served on the parties to the suit. If the city in requiring him to be cited and made party to the suit intended to call him in warranty, we cannot permit such pleading; there is no law authorizing such practice, there is no joinder of issue between the appellant, James McKenzie, and the plaintiff, A. Marchand.

Alfred Marchand v. Robert B. Bell and City of New Orleans and James McKenzie.

We cannot give judgment in favor of James McKenzie for the amount of his demand because "his suit against the city is not before the court." Nor can we decree that the city of New Orleans shall pay over the amount of its entire indebtedness to Bell to the plaintiff, A. Marchand. The record shows that McKenzie has acquired attaching creditor's privilege on Bell's funds in the hands of the city if his demand be correct and just, which must be determined in his proceeding of garnishment against the city.

We cannot concur in the judgment of the court below ordering the city of New Orleans to pay over its entire indebtedness to Bell, to wit : five thousand dollars in part satisfaction of the judgment of plaintiff against the defendant, Robert B. Bell, in preference to all other claimants. We think James McKenzie had acquired attaching creditors' privilege on the funds of Bell in the hands of the city, and he had priority over plaintiff to the amount of his claim. The answer of the city of New Orleans and the garnishment proceedings received in evidence without objection, establish proof of the attachment of the funds of Bell in the hands of the city, at least to an amount equal to the demand of McKenzie. We do not think the city should be ordered to pay over to plaintiff funds attached in the suit of garnishment by James McKenzie.

It is therefore ordered that the judgment ordering the city of New Orleans to pay over to the plaintiff, A. Marchand, five thousand dollars, acknowledged to be due Robert B. Bell, be avoided and annulled, and it is now ordered that plaintiff have judgment against the city of New Orleans for five thousand dollars with five per cent. interest thereon from the fifth of September, 1866, less the amount demanded in the garnishment process by James McKenzie v. the city of New Orleans, to wit: eighteen hundred and eighty-seven dollars and ninety-six one hundredths, with eight per cent. interest on one thousand four hundred and eighty-three dollars and ninety-six cents thereof, from the fifth of July, 1860, and on three hundred and ninety-four dollars thereof from the seventh of April, 1860, and costs of garnishment process, subject to a credit of four hundred and fifty-five dollars and fifty cents, collected on the execution of McKenzie v. Robert B. Bell, on seventeenth July, 1866. It is ordered that the city of New Orleans retain the amount as aforesaid demanded by James McKenzie, and hold the same subject to the action of the District Court in the case of James McKenzie v. the city of New Orleans, without prejudice to the right of the plaintiff, A. Marchand, to intervene in that suit, and contest the validity of the claims of said McKenzie v. Robert B. Bell and the city of New Orleans made party garnishee.

And that plaintiff and appellee pay costs of appeal.

 Andrew Matta v. William Thomas, et al.

No. 1671—ANDREW MATTA v. WILLIAM THOMAS, et al.

*A writ of fieri facias is the basis of proceedings in garnishment.**The service of interrogatories on the garnishee will not operate a seizure of the assets in his hands unless the Sheriff holds at the time a writ of fieri facias against the defendant.***A** PPEAL from the Fifth-Judicial District Court, parish of East Baton Rouge, Pooey, J.*Fugua, Callihan, Burgess and Chanoy, for appellant. Cross & Hardy, for appellee.*

REPORTER.—This case was decided in the month of June, 1868, by the Supreme Court, organized under the constitution of 1864, and an application for rehearing was made just before the adjournment of the court, which was examined and refused by the present Supreme Court in the month of January, 1869.

ISLEY, J. Under a writ of *fiery facias*, issued out of the Fifth Judicial District Court of East Baton Rouge, in the suit of A. Matta v. William Thomas, et al, certain property of the defendants was seized, and not bringing at the cash sale two-thirds of its appraised value, was subsequently offered for sale on a credit, and was bid off to the defendants for the sum of two thousand two hundred and thirty-five dollars, the purchasers furnishing their twelve months' bond, with Jeff. Thomas as surety.

This bond was not paid, and on the twentieth of November, 1865, a writ of "*alias fieri facias* on twelve months' bond," the only writ of *fiery facias* ever issued on the bond, was taken out by the plaintiff's counsel, who, on the seventh of December, 1865, returned it into court with the following written statement on the writ: "This *fiery facias* is returned, not having been in the hands of the sheriff," signed by the plaintiff's counsel and dated as above.

Previous to the issuance of the alias writ, viz: on the tenth of November, 1865, petition of garnishment and interrogatories had been filed by the plaintiff in court against David Pipes, and process thereon was served on him on the day following. The answer of Pipes to the interrogatories were not filed until the fourteenth of June, 1867, and it appears from his answers that in the interval between the service on him of garnishment process and the filing of his answers, he had, without any reference to the garnishment, compromised with Jeff. Thomas, his alleged creditor, and paid him in full on his claim, which had been pending in court, five thousand dollars.

A rule was thereupon taken by the plaintiff on Daniel Pipes to show cause why judgment should not be entered up against him for the full amount of plaintiff's claim, less than the amount paid to Jeff. Thomas.

This rule, to which Pipes filed in court his answer, was dismissed, the court being of the opinion that the contract sued on by Jeff. Thomas against Pipes was an immoral and illegal one.

It is evident that on the tenth of November, 1865, when proceedings in garnishment against Pipes commenced, no writ of *fiery facias* had

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been applied for by the plaintiff or issued, and that when the sheriff served the interrogatories on Pipes, no writ of *feri facias* on the twelve months' bond was in the hands of the sheriff, and no constructive seizure could therefore have been made by service of the interrogatories. See *Simpson v. Allum*, sheriff, 7 R. 505; *Roliteau v. Falton*, 11 R. 221; 2 A. 310.

In the case of *Copnell v. Fretnell*, 2 A. 310, this court said "it is quite unnecessary to inquire into the alleged default of the garnishees, and the defectiveness of their answers.

The proceedings against them were *ab initio* null and void. A *feri facias* is the basis of the proceedings under the act of 1839, and by express terms of the statute, the property and effects in the hands of the garnishees shall be decreed to be levied upon by the sheriff from the date of the service of the interrogatories on such persons.

If there is no writ of *feri facias* extant, or it has expired, proceedings against garnishees are void.

For the reasons now given, it is ordered, adjudged and decreed that the judgment on the rule be, and it is hereby affirmed, at the cost of the appellant.

Rehearing refused.

No. 1402.—REDELIA KELLAR v. MRS. M. L. H. BLANCHARD.

A transfer of a lease by the executrix of an estate is null.

Where a sale of a lease, owned by a succession, has been judicially declared to be null, the property in the lease reverts to the estate.

The surviving wife, being a partner in community, is competent to purchase property at probate sale, which she administers as executrix. Acts of 1865, page 78, section 8.

A sheriff may cause a deed to be made and attested by any of his legally qualified deputies, and when so made and attested it has the same validity as though it were made and attested by the sheriff.

The possibility that a purchaser may be compelled to bring a suit at law to gain possession of the thing purchased does not constitute it a litigious right.

APPEAL from the Third District Court of New Orleans, *Fellowes*, J. *J. P. Hornor*, for plaintiff and appellee. *E. Rawle* and *A. & M. Voorhies*, for defendant and appellant.

TALIAFERRO, J. The plaintiff, averring herself to be the assignee of certain claims from Theresa Smelser against the defendant, brings this suit to recover them. She claims eight hundred and four dollars and seventy-three cents, with interest, arising from a contract of lease originally entered into between the defendant and Levi Smelser, the husband of the plaintiff's assignor. She also claims four thousand three hundred and sixty-seven dollars and sixty-eight cents, with interest on portions of that amount from different periods, the estimated value of certain buildings erected by Levi Smelser for the defendant on three several lots of ground owned by her, and situated on Tchoupitoulas street, in the city of New Orleans. The answer of the defendant is a general denial. The plaintiff had judgment in the court below, and the defendant presents this appeal.

Rodelia Keller v. Mrs. M. L. B. Blanchard.

The facts seem to be these: In January, 1853, Levi Smelser leased from the defendant the lots of ground referred to for a term to expire on the first of November, 1860. He was to pay one thousand eight hundred dollars per year, and to make payments for each month successively. It was likewise agreed, that during the lease, Smelser was to build, at his own expense, one or more houses upon the lots, according to plans and specifications that might be agreed upon by the parties; that at the expiration of the lease the defendant was to pay to the builder the value of the buildings so to be erected, a portion in cash and the remainder in several installments falling due at different periods. The parties stipulated that the value of the buildings should be ascertained by an appraisement to be made by experts, or, as they termed them, arbitrators; each party to select one, and the two arbitrators to choose one umpire.

In May 1855, Smelser died, but previous to his decease, he completed his engagement to build the houses he had contracted for with the defendant. He died without descendants, left a will by which he bequeathed a portion of his estate to his mother, and another to his wife, whom he appointed his executrix. She qualified in that capacity, and caused the usual mortuary proceedings to be taken. The estate seems to have been considerably burdened with debts, and badly administered. Among those interested in the succession much litigation occurred.

As bearing more especially upon the points in controversy in this case, it will be proper to notice more particularly the facts connected with two events that grew out of the administration of the estate, viz: the sale of the lease which expired on the first of November, 1860, and the sale of the interest in the buildings erected by Smelser on the lots of the defendant. Upon the application of the executrix, filed on the twentieth of September, 1855, setting forth that previous sales of property of the succession had failed to realize sufficient funds to pay debts, an order was rendered on the following day for the sale of the lease. On the eleventh of December, of the same year, on a rule taken against the executrix by Todd & Co., creditors of the estate, an order of sale was rendered on the fourteenth of that month for sale of property of the succession to discharge their debt. The order of sale was directed to Beard, an auctioneer, who, after the usual advertisements, made sale of the lease on the twenty-ninth of December, 1855. The defendant purchased it at the price of one dollar. The executrix brought suit in November, 1857, to annul this sale. A judgment pronouncing its nullity was rendered on the twentieth of December, 1858, and this judgment, with a slight modification, was confirmed on appeal to this court in April, 1860. See 15 A. page 264.

The defendant went into possession of the leased premises under the sale made on the twenty-ninth of December, 1855, and retained possession until the lease expired by its limitation in November, 1860. As

the value of the lease had increased after the erection of the buildings by Smelser, the court awarded the plaintiff the sum of eight hundred and four dollars and seventy-three cents, being the excess in value in favor of the estate over the amount it was bound for to the defendant under the original contract. On the application of Dunham, one of the creditors of the succession, an order of sale of property of the succession was rendered on the twenty-seventh of June, 1857, and under this order, the only remaining asset, as it seems, of the succession, its interest in the buildings erected on the defendant's lots, was sold on the eleventh of September following, and Mrs. Smelser, the executrix, in her individual capacity, became the purchaser. It was adjudicated to her at the price of sixteen hundred dollars, and retaining in her hands nine hundred and sixty-seven dollars and thirty cents. She executed a twelve months' bond for the remainder, Mrs. Kellar, the plaintiff in this suit, being her surety on the bond. This bond was assigned by the sheriff to Mrs. Kellar on the twenty-sixth of September, 1857, she, as is averred in argument, having paid it. To all her rights acquired by the sale made on the eleventh of September, 1857, Mrs. Smelser substituted Mrs. Kellar by a written act, dated twenty-second of November, 1858, transferring to her all the interest of the succession in the buildings erected on the defendant's lots, and subrogating her "to a certain suit pending against Mrs. Blanchard and husband, being No. 1339, of the docket of the Second District Court of New Orleans, and to all the advantages, sum or sums of money that may be had, obtained or gotten by reason or means of any judgment or proceedings to be had thereupon." This clause in the act of transfer refers to the suit then pending, to annul the sale by virtue of which the defendant had acquired title to the unexpired portion of time the lease had to run.

The ground taken by the defense is, that by none of these proceedings did the executrix, in her individual capacity, acquire any title to the rights she pretends to have transferred, and consequently that the plaintiff, as her transferee, stands in the same attitude. It is argued that the proceedings were illegal and null; that the sales under which the plaintiff holds were made under writs of *fiery facias*, a proceeding unknown to the law in the sale of succession property; that admitting the estate had rights against the defendant, these rights have not been divested, and therefore, that the estate not being a party to this suit, would not be concluded by a judgment rendered in favor of the plaintiff against the defendant, and that the transaction between the executrix and plaintiff, was the transfer of a litigious right entitling the latter to recover only the amount she paid, if entitled to recover at all.

An examination of the record satisfies us that there is error in the judgment of the court below in decreeing the defendant to pay the plaintiff the amount ascertained to be due under the contract of lease. At the time of the transfer of Mrs. Smelser to plaintiff, he had no right to the interest of the estate in the lease, and consequently conveyed

none to the plaintiff. On the contrary, at that time a suit was pending in her name as executrix, to annul the sale invoked by creditors, at which the defendant had purchased the lease and was in possession of the premises subject to its decision. By the annulment of that sale the rights under the lease reverted to the estate, and we do not find that they were subsequently acquired by Mrs. Smelser or any other party.

The assignment by the same act of transfer of the rights and interest of the estate in the three brick buildings erected by Smelser on the defendant's lots stands on a firmer foundation. On the seventh of April, 1857, Dunham, a creditor, obtained judgment against the succession for five hundred dollars with interest. On the fourth of June, 1857, he took a rule on the executrix to show cause why property of the estate should not be sold to pay this judgment, and on the twenty-ninth of the same month the rule was made absolute, ordering property of the estate to be sold to pay the judgment. Upon this order of court the *fieri facias* or authority to the sheriff to make the sale issued. The interest of the estate in the buildings spoken of was seized, and after the usual notices and advertisements was sold. All the proceedings seem to have been regular, and all the formalities required in the sale of succession property under the like circumstances to have been observed. The executrix was the surviving partner in the community that existed between her and her husband, and had the right to purchase the property. Acts of 1855, page 78, section 8.

Before answering to the merits, the defendant excepted to the action denying that plaintiff was, as she alleged herself to be, separate in property from her husband. The exception was properly overruled. The fact of separation in property was fully proved on the trial of the exception, by the marriage contract between the husband and wife, and by a judgment of the wife against her husband to recover her paraphernal property.

The defendant reserved a bill of exceptions to the admission in evidence by the court, of the sheriff's deed to Mrs. Smelser, dated the eleventh of September, 1857, on the ground that the act was signed not by the sheriff as required by law, but by Blossman, a deputy sheriff. This objection is without weight. The law provides for the appointment of deputy sheriffs. It is made the duty of each sheriff or deputy to execute all writs, orders and process of the court or judge thereof that may issue to them directed. Revised Statutes, p. 524, sections 5 and 6. *Qui facit per alium facit per se.*

It is contended on behalf of the defense that the appointment and proceedings of the experts to appraise the value of the buildings were irregular and of no legal force. Esterbrook and Gott, it appears, were selected to make the estimate. The former was chosen, as he states in his testimony taken under commission, "by Mrs. Blanchard, through her husband, A. G. Blanchard." The latter was selected by the plaintiff. They agreed in the estimate made, and no umpire was therefore chosen.

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The objection that three experts did not act has no force. No necessity existed for an umpire. It does not appear that the experts acted under oath, or that they were required by the parties to be sworn. Neither to the introduction in evidence of the certificate of the appraisers signed by them, nor to the testimony of one of them regarding his appointment was there any objection made on the trial of the case. No attempt was made by defendant to show that the appraisement was not fairly made, or that the valuation was too high.

For the defendant, it is further held, that the assignment of the supposed rights of Mrs. Smelser was, in fact, a litigious right. We do not so regard it. The estate of Smelser clearly had under the contract an interest in the buildings erected by him on the lots of the defendant. That interest, whatever it might be worth, was sold by an order of a competent tribunal to raise means wherewith to pay debts of the succession, and it was bought by the widow of the deceased. This sale, as to Mrs. Blanchard, was *res inter alias acta*. It was of no moment to her whether the thing sold brought much or little. As between her and the estate or its assignee, the value of the interest of the estate in the buildings was to be fixed by the mode provided by the contract, the law established by the parties for themselves, that is, by an appraisement to be made by experts to be appointed by themselves. No litigation whatever existed in relation to the right sold at the time it was transferred to the plaintiff. She acquired it, and might, for all she knew, realize its value without litigation. The possibility that a suit at law might be necessary to enforce the claim, does not constitute it a litigious right. We consider the interest of the estate in the buildings and the lease of the property as two distinct things. They are not complicated in the suit to annul the sale of the lease. We have already said, that in our opinion, the subrogation of the plaintiff to all the rights of Mrs. Smelser in the action of nullity, then pending, conveyed no right to the plaintiff. It is therefore unnecessary to determine whether the subrogation amounted to the transfer of a litigious right or not. But if it were a litigious right, the fact of its transfer being made in the same act with the transfer of the interest in the buildings, by no means affects the validity of the latter. *Utile per inutile non vitiatur*

It may be remarked that all the evidence introduced in support of the plaintiff's claims, with the single exception of the sheriff's deed, already noticed, was received without objection by the defendant. We conclude, that with some modification, the judgment should be maintained.

It is therefore ordered, adjudged and decreed that the judgment of the district court, so far as it decrees the defendant to pay the plaintiff the sum of eight hundred and four dollars and seventy-three cents, with interest specified, be annulled, avoided and reversed, and that in all other respects it be confirmed, reserving to the estate any rights it may have against the defendant growing out of the contract of lease.

It is further ordered that defendant and appellant pay the costs in the lower court, the plaintiff and appellee to pay the costs of the appeal.

Rehearing refused.

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No. 1816.—STATE OF LOUISIANA, ex rel., MRS. GAUSSON, Executrix, and D. D. WITHERS v. THE JUDGE OF THE SECOND DISTRICT COURT OF NEW ORLEANS.

21	43
46	496

21	43
52	108
52	108
52	109
52	110

An executor or administrator is an officer of the court, and the funds coming into his hands as such are amply secured by the bonds he is required to give before entering upon the duties of his office.

A bond in amount sufficient to cover costs will entitle any party to a suspensive appeal therefrom. The rule laid down in article 575 of the Code of Practice, which requires that the appeal bond to be given for a suspensive appeal shall exceed by one-half the amount of the judgment appealed from, does not apply to a case where an appeal has been taken from a judgment homologating a *tableaux* filed by the executor; this class of cases is governed by the doctrine taught in *Blanchin v. Steamer Fashion*, 10 An. 345, *State ex rel. Hickey v. Judge of the Fourth District Court of New Orleans*, 20 An. 106, which may be rendered as follows: Where there is no standard specially fixed by law as to the amount of the appeal bond required to operate a *supersedeas* pending the appeal, the Judge *a quo* should allow a suspensive appeal on appellant's giving bond in an amount sufficient to cover costs.

21	43
122	61
122	90
e122	91
f122	92
21	43
125	966

After an appeal bond has been filed, the Judge *a quo* is competent only to determine whether the appeal is suspensive or devolutive, and to ascertain whether the sureties on the bond are such as the law requires.

The Supreme Court will, on application for a prohibition, inquire into the sufficiency of the appeal bond to entitle the appellant to a suspensive appeal.

A PPEAL from the Second District Court, *Thomas, J. Bradford, Lea & Finney*, and *Roselius & Philips* for relators.

REPORTER.—This case was decided in the month of June, 1868, by the Supreme Court organized under the Constitution of 1864. Application for rehearing being made and not disposed of by that tribunal, was transferred to the present court, and on re-examination refused.

ILSLEY, J. This is an application for a writ of prohibition to the Judge of the Second District Court of New Orleans, and others.

The facts necessary to a proper understanding of the case are the following The plaintiff in the suit in the said court, pending on the first of May, 1868, entitled Marie F. L. Ledoux, wife of John K. Elgee, deceased, *v. Bessie Elgee Scott*, heir and testamentary executor of J. K. Elgee, No. 2990, obtained a final judgment against the succession of John K. Elgee for—

First—The sum of one hundred and twenty-two thousand nine hundred and one dollars and ninety-six cents (\$122,901 96), with five per cent. interest on \$95,969 66 thereof from various persons.

Second—For the delivery as her property of 579 3-5 shares of gas light stock with \$17,938 80 dividends accrued thereon, and now in the Gas Company's office, requiring the defendant to transfer the same stock and money, the said \$17,938 80 forming a part of the above \$122,901 26, and the balance, say \$104,963 16, in due course of administration.

From this judgment the defendant in the above suit, and also an intervenor, who claimed to be a creditor of the succession of J. K. Elgee for a large amount, obtained, in the legal delay from the court below, suspensive appeals to this court, on their giving each a distinct bond for five hundred dollars, the amount fixed by the judge. Afterward, on

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the application of the plaintiff, the inferior court set aside the suspensive appeals and declared executory the judgment rendered by it on the first of May, 1868.

The defendant and intervenor ask this court to issue a prohibition to the judge of the inferior court and to the plaintiff, inhibiting all proceedings whatever in execution of the said judgment during the pending of the suspensive appeal taken therefrom.

It is not denied that within the legal delay of ten days next succeeding the date of the order granting the suspensive appeal, appeal bonds, conditioned as the law requires, for the amount specified thereon, with good legal sureties, were duly filed by the appellants in court,

From this statement two questions arise—

First—Was the amount of each of the said bonds, as fixed by the lower court sufficient to operate a *supersedeas*?

Second—Had not the jurisdiction of the appellate court attached as soon as the appeal bonds were filed and the citation issued, which is unnecessary on appeals allowed in open court?

I. It was the opinion of the judge of the court below, and it is strenuously contended in this court, that article 575 of the Code of Practice must be applied as cogently to judgments rendered against executors and administrators, approving judicially claims against succession, as to any other class or kind of judgments.

This court thinks otherwise.

That article, properly read, refers evidently to ordinary judgments between individuals; whenever the amounts are so specified that if execution is not stayed, writs of *fieri facias* may issue at once to recover such specific sums as are thereby adjudged. It has no application to such judgments which are necessarily held in abeyance and which can not be made executory until it be ascertained contradictorily with other parties in interest, on a tableau of distribution, whether the whole or any portion of such claims, although judicially recognized, can be made available.

A judgment recognizing a claim against a succession has generally no greater force in law than an acknowledgment of the claims by an executor or administrator. See articles 985 and 986 of the Code of Practice.

In either case the creditor can only obtain the payment of it concurrently with the other creditors. C. P. Arts. 986, 1054.

Whether a claim against a succession is recognized judicially in a direct action, or by opposition to a tableau of distribution, 10 An. 224, in either event, whatever may be the amount of a creditor's judgment, he can only recover on it such amount as may be awarded to him in such tableau when duly homologated.

An executor or administrator is an officer of the court, and any funds or property in his hands belonging to the estate he administers, are amply secured, as the law does and the creditors may require bonds to

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secure them and to ensure the faithful administration, and the creditor incurs no risk by the delay which an appeal, that every executor or administrator has the legal right to take (art. 572 C. P.), may occasion.

Be this as it may, it suffices that article 575 of the Code of Practice has not in letter or spirit any applicability to such a case as this, which is governed by the doctrine taught in *Blanchin v. The Steamer Fashion*, 10 An. 345. *State ex rel. Hickey v. The Judge of the Fourth District Court of New Orleans*, 20 An. 108, and other kindred cases, a doctrine which the intervenor, who is not condemned to pay anything, may invoke in exercising his right of appeal. C. P. 571.

And the doctrine is one sanctioned by reason and common sense, when applied to executors and administrators, otherwise their right to appeal would in most cases, for any practicable purpose, be wholly nugatory; as it would require *them* to furnish security for the payment of debt, only recognized judicially for a solitary purpose, and which might turn out eventually to be utterly valueless by reason of the insolvency of the succession against which they have claims.

As to the stock and dividends held by the Gas Company, and which the judgment of the lower court orders the executor and defendant to transfer to the plaintiff, that is certainly not covered by article 575 C. P., which refers to the specific sum which a party is condemned to pay, nor does it fall under article 576 C. P., which refers to tangible movable property of a *perishable nature*, and not to mere incorporeal rights. No transfer of that stock and dividends could be made to the prejudice of the plaintiff, and a bond for costs for that would certainly suffice to prevent its becoming executory. The decree itself, if not reversed, would, if the execution did not, according to the terms, transfer the stock and dividends, confer a title upon the defendant therefor.

II. It has been repeatedly held by this court that the moment a sufficient appeal bond is signed and citation issues, the jurisdiction of the Supreme Court attaches. See numerous cases collected in 1 Hen. page 74, section 3; and in the case of the *State ex rel. v. The Judge of the Fifth District Court*, it was held after the order was made and signed, granting a suspensive appeal, and approving the bond furnished by the appellant. We think the jurisdiction of the District Court was incompetent to disturb the order. If a bond is insufficient in amount to authorize a suspensive appeal, but is good for a devolutive appeal, the appeal will not be dismissed, but execution may issue (5 An. 366, 12 An. 175), but may be enjoined.

It was within the province of the lower court to say if the appeal was suspensive or devolutive, and to inquire into the question whether the appellants presented such sureties as the law required. It declared the appeal suspensive; and the security furnished for the amount is not questioned. We have examined the numerous authorities cited by the plaintiff, but they do not militate against the doctrine now announced.

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We think the bonds sufficient to render the appeal suspensive, and that the relators are entitled to a writ of prohibition as prayed for.

It is therefore ordered, adjudged and decreed that a mandate or writ of prohibition, issue to the Judge of the Second District Court of New Orleans, and to the plaintiffs in the within described suit, No. 29,990 as prayed for in the relator's petition.

Mr. Justice Taliaferro dissenting:

The judgment appealed from requires the executrix to do a certain act and to pay a specific sum of money. The required act and the payment of the specified sum of money it is impliedly in the power of the executrix to perform.

The appellants hold that the decree of May 1, 1868, against the executrix of J. K. Elgee, was merely a judgment liquidating a claim against a succession; and in that form to be afterward placed on a tableau as an acknowledged debt to be paid in due course of administration according to its rank, if unaltered on appeal. That the order was therefore properly rendered for a suspensive appeal on a bond to cover costs. That the order being complied with and the required bond filed, the case was then beyond the reach of the District Court, which could not legally rescind the order and declare the judgment executory.

It is contended on the part of the appellees that the proceedings in relation to the appeal were *ex parte* and unwarranted by law; and the same view of the subject seems to have been taken by the judge also when he reversed the order on trial of the rule. The appellees insist that the character of the appeal is fixed as devolutive, inasmuch as the bond was not given for an amount to render it suspensive; and that no law authorizes any other bond now to be given, and that the appellants cannot, upon principles of equity, claim the right to furnish a bond to make the appeal suspensive.

These issues being presented, I have to inquire whether the judgment appealed from belongs to that class of judgments from which suspensive appeals are often taken upon bonds to cover costs only; and whether the judge *a quo* had legally the right after the appellants had complied with his order, by furnishing the required bonds, to rescind the order and render the appeal devolutive, leaving the appellants free to proceed to the execution of the judgment.

A reference to adjudged cases seems to indicate that generally where suspensive appeals have been taken on bonds to cover costs only, the property to be delivered, or the fund to be divided, was not in the hands of the appellant, or where the appellant was not ordered to pay anything. In the case of *Millaudon v. Percy*, 7 N. S. p. 353, the appeal was from a judgment of partition where the property was in the actual possession of the appellee. In the case of *Heath & Co. v. Vaught, et al.*, 16 La. 515 the fund to be divided was in court. In the case of *Blanchin v.*

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The Steamer Fashion, 10 An. 345, the money to be distributed was not in the hands of the appellant. In that case the court said—"The expressions of this article (575 C. P.) imply that the judgment to necessitate a bond in one-half exceeding its amount must be one in which the appellant has been compelled to *pay*, and do not seem applicable where the party appellant is condemned to pay nothing." In the matter of the succession of G. W. Parker, 18 An. 645, it was laid down that the judgment appealed from not being, in the language of article 575 of the Code of Practice, for a specific sum of money, a bond for costs only is sufficient to suspend execution. In the case of the State v. The Judge of the Fourth District Court of New Orleans, *ex relatione* Daniel Hickey, 20 An. p. 108, the court sustained the relator, who contended that as he was not condemned by the judgment complained of to pay a sum of money nor to deliver real estate, a bond of appeal for \$250, an amount sufficient to cover costs, was sufficient.

In the case, State v. The Judge of the Second District of New Orleans 16 An. 371, opponents to a tableau of distribution were awarded a sum of money. The executrix was granted an appeal on giving bond and security "as required by law." The bond given being for a less sum than that required for a suspensive appeal, according to article 575 C. P., the court dismissed the application for a mandamus prayed for to compel the District Judge to grant the relators a suspensive appeal on the bond furnished.

Although it is not in conformity with the intent and purpose of the law, which certainly contemplates an equitable distribution of the proceeds of an estate among its creditors, to permit the execution of judgments against successions for the payment of money to be proceeded with as in ordinary cases by *feri facias*, yet, I am unable to find in the provisions of the Code of Practice regulating the mode of proceeding in cases of appeal, that there is any distinction in favor of successions, by which an administrator or an executor is exempted from a compliance with article 575 C. P., where he appeals from a judgment ordering the payment of a specific sum of money. I must reiterate the declaration made by this court in the case last referred to, 16 An. p. 371. Referring to the requirements of articles 574 and 575 C. P., Chief Justice Merrick said: "We are aware of no law which exempts successions (against which judgments have been rendered) from this rule." The cases in 16 L. 515 and 10 An. 345, do not make such exception. Articles 575 and 1043 C. P., construed together, seem to me to sustain this opinion.

Coming to the second branch of the inquiry, which relates to the legal right of the Judge *a quo* to rescind his first order by which he granted the suspensive appeal and under which he accepted the required bond furnished by the appellants, I shall, as in the first branch, refer to the adjudged cases bearing upon the inquiry. In 5 An. 518, the case of The State v. The Judge of the Second District Court of New Orleans, the court having under consideration the legality of an order of the

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District Judge in granting a party a suspensive appeal from a judgment which removed him from his office of administrator and condemned him to pay a certain sum of money, Mr. Justice Slidell said: "In deciding the application upon this ground (the ground of construing the application for the appeal so as not to involve an attempt by the Judge to violate the law) we are not to be understood as recognizing the position that a suspensive order of appeal illegally granted, would be binding upon the District Judge, especially in a case of this sort where an administrator who has disobeyed the command of the law with regard to the funds in hand," etc. In the case of *Mrs. Perilliat v. A. Fernandez*, 16 An. 192, a motion was made in the Supreme Court to dismiss the appeal as suspensive. The court said: "It is not the practice of this court to decree a qualified dismissal of an appeal such as the rule calls for. Such a decree would be tantamount to an order that execution issue notwithstanding and pending the appeal. It is well settled that an application for an order of that sort must be addressed to the court which has rendered the judgment and not to the appellate court." In 2 Rob. 551 the case of *Stanton v. Parker*, the court said in regard to the application of the plaintiff in that court for a rule upon the defendant to show cause why other and solvent sureties on the appeal bond should not be furnished by him, or in default thereof why the plaintiff should not be permitted to issue execution in *a qua*; "This is a matter which has properly to be tried before the lower court, which, though divested of jurisdiction as to the case itself, and its merits has nevertheless the power of pronouncing on the question whether the appeal is or shall be suspensive or devolutive, and to say whether the appellee shall be entitled to take execution or not, notwithstanding the appeal. The law and the Constitution have not given us that power." In 16 An. 251, the case of *Kelly v. Lehman*, the court dismissed the appeal on the ground that the bond covered the moneyed judgment but not the amount also of the note the defendant was required by the judgment to deliver. By the ruling in the case of *The State v. Judge Buchanan*, 13 La. 574, a party may proceed by rule in the District Court after an appeal granted and bond filed, to show cause why the appeal granted should not be set aside on the ground that the surety on the appeal bond was insufficient and not such as required by law; so if the surety on a suspensive appeal bond is shown to be insufficient, the appellee may have his execution immediately." In *Tanner v. King*, 10 An. 486, a motion was made in the Supreme Court to dismiss the appeal on the ground that the security on the appeal bond was not a resident of the parish where the bond was given. The motion was overruled, the court saying: "The party appellee might have addressed himself to the court of the first instance to test the sufficiency or legal qualifications of the surety on the appeal bond." There are numerous precedents for that proceed-

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ing. In the case of *Byrne v. Riddell*, 4 An. p. 3, a party against whom a judgment was rendered, and who was duly notified of it in December, 1845, applied by petition in the proper court in May, 1846, for a suspensive appeal. The Judge's order on the petition was as follows: Let an appeal be allowed in this case, returned to the Supreme Court on the third Monday in June, 1846, on the appellant's giving bond in the sum of \$600, with J. L. Riddell as security, conditioned as the law directs. A bond was furnished according to the order. Afterwards upon suit brought against the surety, the question was as to whether the appeal was suspensive or devolutive. The court determining it to be devolutive, remarked: "Suppose the order of the Judge had said that a suspensive appeal was granted. It would have been in direct violation of law and being rendered *ex parte* could not affect the plaintiff's right to execution which was acquired by the expiration of the legal delay. It is therefore clear that the plaintiff could have executed the judgment after the appeal was granted."

To the same purport are many other cases found in our jurisprudence, and also in that of other States of the Union. See the case of *Cothe v. Crane*, Barber's Chancery Reports, p. 22, and that of *Saltmarsh v. Tutriel*, 12 Howard, p. 337.

I think there can be no doubt that the courts of the first instance have full and exclusive jurisdiction on appeals until the party appealing has fully complied with the terms of the law on the subject of appeals, whether suspensive or devolutive. That until such compliance the Judge of the court *a quo* is executory, and the Supreme Court has no jurisdiction of the case, and that the court of the first instance is not divested of jurisdiction over the case until the appeal has been formally and regularly taken according to law. I am of the opinion that in the case under consideration it was incumbent upon the appellants to have furnished within ten days from the date of the order of appeal, a bond exceeding by one-half the amount of the sum of money decreed by the judgment to be paid, fulfilling the requirements of article 575 of the Code of Practice. That this case is not one admitting a suspensive appeal to be granted on a bond to cover costs. That the bonds for \$500, each given as stated by the Judge *a quo* at the instance of and upon the suggestion of the appellants themselves, are manifestly very far below the sum that would have been required for a suspensive appeal. That they can avail only to sustain a devolutive appeal. That the proceeding by rule in the lower court to rescind the order first rendered and to make the judgment executory was a legal proceeding; the first order having been illegally rendered. I am of the opinion that prohibition applied for ought not to be granted.

I concur in this opinion, and dissent from that of the majority of the court.—[W. B. HYMAN, C. J.]

State of Louisiana, ex rel. Mrs. Gausson, Executrix, and D. D. Withers v. The Judge of the Second District Court of New Orleans.

ON APPLICATION FOR REHEARING.

LUDELING, C. J. We refuse to entertain the application for a rehearing in this case, because article 851 of the Code of Practice declares that the court shall *pronounce finally* and summarily on the right of jurisdiction.

There is no delay necessary to make the order final. The application must therefore be dismissed.

No. 1225.—PIERRE COUSSIRAT v. THEODULE OLIVIER.

In an action of damages for slander where the verdict of the jury is manifestly contrary to law and the evidence, the Supreme Court will not undertake to assess the damages, but will remand the case for a new trial.

APPEAL from the Sixth District Court of New Orleans, *Duplantier, J. Fred. Buisson & A. Derbes* for appellant, *Sambola & Ducros* for appellee.

LUDELING, C. J. A careful examination of the testimony in this case has convinced us that the verdict of the jury was contrary to law and the evidence. In a case so peculiarly within the province of a jury, we would not disturb the verdict, if it were not manifestly wrong.

But we are not satisfied, that, under the circumstances, this court should assess the damages.

It is therefore adjudged and decreed that the judgment of this court, rendered on the twentieth of April, 1868, be avoided; that the judgment of the lower court be reversed, and that the verdict of the jury be set aside. It is further ordered that this case be remanded to the District Court for further proceedings according to law, and that the appellee pay costs of the appeal.

No. 1435.—W. F. WILLIAMS v. F. O. WOODMAN.

Where the appeal is manifestly taken for delay the judgment appealed from will be affirmed with damages for frivolous appeal.

APPEAL from the Third District Court of New Orleans, *Fellowes, J. C. Roselius & Alfred Philips* for plaintiff, *Henry J. Leovy* for defendant and appellant.

LUDELING, C. J. This suit was brought on a promissory note. The defense is a general denial. There was judgment in favor of the plaintiff, and the defendant has appealed.

The evidence clearly sustains the judgment, and it is manifest that the appeal is frivolous.

It is therefore ordered and adjudged that the judgment of the lower court be affirmed, with seventy-five dollars damages and costs of this court.

John Rooney v. W. H. Brown.

No. 1867.—JOHN ROONEY v. W. H. BROWN.

A contract with the City of Jefferson for curbing and gutter built on the sidewalk within the corporation is not a tax, toll, or impost, within the meaning of article 74 of the Constitution of 1868.

Where the amount involved does not exceed five hundred dollars, the appeal will be dismissed.

A PPEAL from the Second Judicial District Court, Parish of Jefferson,
Dugue, J. Geo. L. Bright, Cazabat & Philips for appellant, *W. B. Koons* for appellee.

HOWE, J. The appellee moves to dismiss the appeal on the ground that the amount involved is less than five hundred dollars.

The suit is brought to recover four hundred and twenty-one dollars and sixty-three cents, and about five months' interest, for curbing and gutter built in front of the defendant's property, in Jefferson City, under a contract with the city adjudicated to plaintiff in pursuance of an ordinance; it being claimed that defendant is liable to plaintiff under the provisions of the act of 1867. There was judgment for defendant, and plaintiff has appealed.

The question upon this motion is whether the amount claimed is a tax, toll, or impost in the sense of article 74 of the Constitution, so as to give this court jurisdiction without regard to the amount involved.

The question must be answered in the negative. In the case of the *City of Lafayette v. the Male Orphan Asylum*, 4 An. p. 1, this court held that the amount demanded by the corporation as a contribution to the expense of paving sidewalks in front of the property of the Asylum was not a tax, and approved the doctrine laid down in the *matter of the Mayor of New York*, 11 John. 80, in which a similar decision was made. It will not be contended that the claim sued upon is a toll or impost. The appeal must therefore be dismissed.

It is therefore ordered that the appeal herein be dismissed with costs.

No. 1950.—STATE OF LOUISIANA, ex rel. MICHAEL WELSH, v. THE JUDGE OF THE NINTH JUDICIAL DISTRICT OF LOUISIANA.

Whenever the Judge of the District Court is personally interested in the suit he shall call upon the Parish Judge of the parish where the suit is pending to try the case. Constitution of 1868, art. 90.

A PPLICATION for a *Mandamus*. *H. S. Lasse*, Attorney and Agent for petitioner for *mandamus*.

LEDELING, C. J. An application is made to this court for a writ of *mandamus* to compel the Judge of the Ninth Judicial District Court of Louisiana to call upon the parish judge of the parish of Rapides to try the suit number eighty and a half on the docket of the Ninth District Court, held in the parish of Rapides.

The answer of the Judge is considered insufficient to justify his conduct. Article 90 of the Constitution of this State declares when the

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District Judge is personally interested in the suit, he shall call upon the parish judge to try the case. Ordering a suit to be placed on a *recused* docket, *simply*, is not a compliance with the requirements of the Constitution.

We think that the order prayed for by the defendant in the suit number eighty and a half, entitled John and W. H. Osborn v. Michael Welsh, should have been granted.

It is therefore ordered that the mandamus issued in this case commanding the Judge of the Ninth Judicial District of Louisiana to call upon the parish judge of the parish of Rapides, to try the case of John and W. H. Osborn v. Michael Welsh, pending in the District Court held in and for the parish of Rapides, be made peremptory.

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No. 1999.—P. M. LAPIN v. P. M. B. LAPIN ET ALS.

The only question presented on an appeal by a third party from an order of seizure and sale is, had the Judge who granted the order sufficient evidence before him to authorize the issuing of the writ. A third party appealing from an order of seizure and sale, may avail himself of all that is in the record that affects his rights; but the validity of the mortgage on which the order of seizure is based cannot be inquired into on such appeal.

A PPEAL from the Fourth Judicial District Court, parish of St. James, *Beauvais, J. Fellows & Mills, Poche & Legendre*, for appellees, *L. Castera and C. Hunt*, for appellant.

HOWELL, J. Mrs. Longpre Fitzgerald, a third person, alleging that she is a mortgage creditor of the defendants, and that she is aggrieved by the order of seizure and sale issued in this suit, has appealed therefrom, and the first question presented is, has she such interest as to maintain this appeal?

The only inquiry on such appeal is, whether or not the Judge had sufficient evidence before him to authorize his *fiat*. 6 R. 58; 11 A. 4; and the appellant complains that there is no authentic evidence of two special indorsements on the note held by plaintiff, and he therefore is without right to the same. She can avail herself of all that is in the record, which affects her rights (3 R. 116); but it is clear that the only interest which she can have in this suit is as to the existence or validity of plaintiff's mortgage, which cannot be inquired into on this appeal. Her mortgage rights cannot be affected by the question, in whom the title to the note in suit legally exists. It is a question which the defendants may waive, and therefore one of which she cannot avail herself in this form of proceeding. See 7 N. S. 676.

It is therefore ordered that the appeal herein be dismissed with costs.

Marie Eugenie Mille and Husband v. Clarisse Dupuy and Husband.

No. 1575.—MARIE EUGENIE MILLE and Husband v. CLARISSE DUPUY and Husband.

The tacit mortgage allowed by law in favor of minors, on the property of their tutor dates from the appointment, and the tacit mortgage allowed by law on the property of the husband in favor of the wife to secure the restitution of her paraphernal property which has come into his hands dates from the time the property was received.

In a case where the property of the husband is not sufficient to pay the mortgage due his ward, for which he is liable as tutor, and the mortgage in favor of his wife for the restitution of her paraphernal property which he has received, the rank and priority of mortgage must be determined by the date at which they respectively took effect.

Obligations to pay money accompanied with a mortgage are classed as movable.

Where two parties holding claims of equal dignity against a third, enter into an agreement in writing to the effect that one is not to take any legal steps without giving the other notice, and in disregard of the stipulations in the agreement one of the parties proceeds by seizure and sale he will not be allowed any preference over the other on account of the seizure thus made in violation of the agreement. In such a case the law will place the other party in the exact position he might have occupied had he received notice.

A PPEAL from Fifth District Court, Parish of Iberville, *Posey, J. Barrow & Pope*, for appellants, *Prorosty, Rousseaux and Estevan*, for appellees.

REPORTER.—This case was decided in the month of March, 1868, by the Supreme Court organized under the Constitution of 1864; an application for a rehearing was made which was still pending at the adjournment of the court. The present court on an examination of the application refused the rehearing in the month of January, 1869.

ILSLEY, J. In the year 1862, Michel Hebert, the legal tutor of the minor Marie Eugenie Mille, then wife of Joseph A. Breaux, filed in the District Court of Iberville, his account of tutorship which represented the liquidated balance in money, besides other property coming to his ward to be fifty thousand seven hundred and seventy-five dollars, on which sum the tutor agreed to pay her interest at the rate of eight per cent. per annum from the thirteenth of May, 1861, secured by legal mortgage on the tutor's immovable property, from the nineteenth December, 1856.

Subsequently, on the sixth of January, 1866, Mrs. Clarisse Dupuy, the wife of the tutor, Michel Hebert, obtained against her husband in a suit for separation of property, a judgment for the sum of fifty-six thousand two hundred and fifty-one dollars and thirty-three cents, with the recognition of her legal mortgage on her husband's immovable property, dating from the respective periods at which the several amounts constituting the above mentioned sum total were received by her husband. These are the conflicting claims against Michel Hebert, which have caused the present controversy, and as the debtor's assets are now insufficient to satisfy both of them, each of the parties to this suit is striving to invalidate the claim of the other. The case is somewhat complicated, and it is rendered more so by an agreement entered into by, or for the parties, to which we shall have occasion presently to refer. Before, however, adverting to the complications occasioned by the agreement, we will proceed to determine the nature and value of each of the conflicting claims; and *first*, that of the minor, the plaintiff in this suit.

The final account of tutorship was rendered in court by the tutor to his ward, who had attained the age of majority in accordance with article 350 of the Civil Code. (See 2 An. 71; 11 An. 523; 8 N. S. 665; Marcade vol. 2, 262. It was found to be correct in every particular, by the ward and her husband, who did not oppose it but prayed for its homologation, and it was thereupon homologated by the court.

The judgment of homologation is not directly attacked for fraud and collusion, and as this court said in *Lessassier v. Dishell*, 17 An. 205: "No evidence has been adduced to show that the amount in favor of the minor liquidated by judgment against the tutor, was not really due; said judgment is not attacked as fraudulent and collusive, and it is *prima facie* evidence that the sum, the payment of which is secured by legal mortgage, is justly due." See also 1 La. Rep. 379; 8 La. 199.

Notwithstanding this, the minor's claim was abundantly proved on the trial of this case. The interest allowed was *eight* instead of *five* per cent. per annum, to which latter rate, as regards the plaintiff, it must be reduced. (2 An. 885.) The judgment being final against the tutor, the ward has no further action against him in relation to the tutorship, and hence, no question of prescription as to the minor's action against his tutor, can be possibly raised against her.

Second.—As to the claim of the wife, the defendant in this suit, against her husband.

Under the pleadings, the onus devolved upon her to show that the judgment separating her in property from her husband, and fixing her paraphernal claims, was correctly rendered; that the money claimed by her was paid into his hands, or that he otherwise disposed of the same for his individual interest. 1 Hen. page 588, C. C. 2367, 11 La. 558, 6 Rob. 36, 18 An. 105, 10 Rob 154. This she has proved satisfactorily.

The amount of her judgment against her husband is therein stated to be fifty-six thousand two hundred and forty-one dollars and thirty-three cents, the whole of which amount came into his hands; but only forty-eight thousand four hundred and fifty-nine dollars of the amount was received by him previous to his appointment as tutor of the plaintiff. Of this last amount, fourteen thousand eight hundred and ninety-two dollars and forty cents is admitted to be a correct charge, and it is proved that the wife's inheritance from her mother's succession, say seventeen thousand eight hundred and seventy-nine dollars and forty-four cents, and also fifteen thousand six hundred and eighty-eight dollars and sixty-four cents, her distributive share of her father's crops, divided from time to time among his children, came into her husband's hands. This is principally proved by the defendant's brother, who from his relationship to the defendant and his proximity to, and constant social intercourse with her, was in a situation to know all the facts to which he testifies. Most of the sums paid to the husband, at different periods, exceeded five hundred dollars, but the testimony of this witness alone is sufficient to establish these payments (M. R. 393; 14 La. 346; 2 An. 536; 8 An. 308), although there is other testimony beside in the record.

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For the sum of forty-eight thousand and fifty-nine dollars and fifty-four cents, received by her husband previous to the 19th December, 1856, the defendant Mrs. Hebert, has a legal mortgage against him on his immovable property, superior and higher in rank to that of the plaintiff, Mrs. Breaux, and this prior mortgage must be first satisfied out of the proceeds of said immovable property. 1 Hen. page 947; 6 La. 26; 5 Rob. 349; 4 An. 569; 2 An. 776.

On the first of February, 1866, in virtue of writs of *fi. fa.*, issued on the two judgments in favor of the plaintiff and defendant respectively, considerable property, movable and immovable, was seized by the sheriff. Among the property thus seized, were three promissory notes, drawn by Tessier and Dubuclet, one for \$2,500, another for \$2,500, and the last for \$4,000, all bearing 8 per cent. interest. After the seizure, and before any further progress had been made in regard to it, the parties to this suit, by their respective counsel, entered into the following agreement:

"Whereas, Michel Hebert and Eugenie Mille, wife of Joseph A. Breaux, hold certain notes drawn by John Chastant and Alice Chastant, and secured by mortgage; and whereas, it is desirable to foreclose the mortgage on same immediately; and whereas, a *projet* for the compromise of the matter of Mrs. Eugenie Mille, wife of Joseph A. Breaux, is on foot: Now, in order to effect such purposes, if possible, it is agreed that neither of us will issue execution in either of said cases, to seize the interest of Michel Hebert in said notes, without giving due notice to the other, and without permitting the other to lay his execution upon same simultaneously if she sees fit; and it is agreed, that the sheriff of the parish of Iberville, shall postpone the sale of the property seized under the writs issued, until further notice from both parties, or until the *projet* for a compromise shall be definitely settled."

In view of this agreement, the Chastant notes, which were in possession of Michel Hebert, were delivered up to the plaintiff's counsel for the purpose of putting them in suit, which was done, the petition being signed by the attorneys of both parties.

The contract alluded to, by which the Chastant notes came under the control of the plaintiff, who by the steps she took in regard to them ratified it (if ratification was necessary—2 La. 140) was evidently passed in mutual confidence and good faith, and should have been observed in a spirit of fairness. It was a law the parties made to themselves, and neither party can be permitted to violate it. Art. 1895 and 1897 C. C. It was distinctly understood that neither of the parties to it was to issue executions on her judgment to seize the interest of Michel Hebert in the Chastant notes without giving due notice to the other, and without permitting the other to lay her execution upon same simultaneously if she sees fit. And yet, in total disregard of this agreement in relation to the Chastant notes, the plaintiff's counsel, under the direction of his client, suddenly takes out writs of *fi. fa.*, under the two judgments in favor of the plaintiff and defendant, both writs addressed to the sheriff of the parish of Point Coupee, the residence of Chastant, and proceeds

to execute the writ in favor of the plaintiff, returning into court the defendant's writ, unexecuted. It is true, the plaintiff's counsel notified the counsel of the defendant that under instructions from his client, he would disregard the understanding or agreement of the twenty-sixth March, and would proceed in the most speedy manner to execute his (her) judgment without regard to that of Mrs. Hebert. Further, that his client had declined the propositions for compromise and they were at an end, and that he returned Mrs. Hebert's writ.

Notwithstanding due diligence on the part of the defendant, it was impossible for her to make a levy simultaneously with that made by the plaintiff upon the Chastant notes, and this was the result of the breach of contract on the part of the plaintiff, who cannot be permitted to profit by her illegal act. Art. 1940 §2 C. C.

Justice and equity require that the defendant be placed in regard to the Chastant notes in the exact position she would have occupied in relation to them had the contract been faithfully adhered to by the plaintiff. As the defendant is legally entitled to have her judgment satisfied by priority and preference over the plaintiff out of the proceeds of Michel Hebert's immovable property, it is contended for her, that the Chastant and Vessier and Dubuclet notes, secured by mortgage, fall in the class of immovables, and that she can claim the proceeds thereof to be applied by preference to her claim. This position is untenable, as by articles 466, 3250 and 3256 of the Civil Code, obligations accompanied with a mortgage are classed as movables. Marcade on this question says:

“L'hypothèque n'est point un démembrement de la propriété de l'immeuble, un *jus in re* sur cette immovable; c'est un simple *jus ad rem ad pecuniam*, comme la créance contre la personne; car, ce n'est rien d'autre chose que cette créance elle-même on tuut qu'elle exerce contre l'immeuble. Tome 2, p. —.

The simultaneous seizure of the property of Michel Hebert in the parish of Iberville, under the two writs, conferred upon each seizing creditor a proportionate privilege upon the movables so seized. Art. 722, 723, C. P., which each seizing creditor could have claimed, so long as her seizure was not released by her. Acts of 1855 page 253 No. 119.

It was not released by the agreement of twenty-sixth March, but that of Mrs. Hebert was by her own act released. Not so that of Mrs. Breaux, who under her seizure caused the Vessier and Dubuclet notes to be sold at sheriff's sale and purchased them herself. Her title to these notes so acquired, was a better one than that which Mrs. Hebert derived from a sale made to her by her husband in part satisfaction of her judgment, whilst the notes were under seizure in the hands of the sheriff, and plaintiff, Mrs. Breaux, is entitled to the proceeds of these notes to be credited upon her execution.

All the questions raised by the pleadings in this case, are thus disposed of.

There are in the record several bills of exception, which as our attention is not directed to them, we have not noticed. 16 An. 86; 14 An. 721.

Marie Eugenie Mille and Husband v. Clarisse Dupuy and Husband.

Considering the reasons above set forth and the law and the evidence, it is, therefore, hereby ordered, adjudged and decreed, that the judgment in favor of Eugenie Mille, wife of Joseph Breaux against her former tutor, Michel Hebert, for the amount therein mentioned, with legal interest and legal mortgage on all his immovable property from the nineteenth December, 1856, the date of his appointment as her tutor, be and it is hereby recognized as valid and of full force and effect in law.

It is further ordered, that the judgment in separation of property obtained by Mrs. Clarisse Hebert against her husband, with her legal mortgage, anterior in date to, and higher in rank than that of Mrs. Clarisse Breaux, but only so far as the amount of forty-eight thousand four hundred and fifty-nine dollars, be and the same is hereby recognized as valid and of full force and effect in law.

It is further ordered, that the title of the plaintiff, Mrs. Breaux, to the Vessier and Dubuclet notes, be and it is hereby declared valid, and that the proceeds of the sheriff's sale thereof, be applied *pro tanto* to the extinguishment of her claim against her tutor.

It is further ordered, that all the proceeds of the immovable property of Michel Hebert, seized and advertised to be sold by the sheriff, when sold, or if already sold, be and the same be first applied to the payment of the legal mortgage in favor of the defendant by preference over the legal mortgage of the plaintiff, Mrs. Breaux.

It is further ordered, that the sheriff of the parish of Pointe Coupee, do, on his making his return to the District Court of Iberville under the writ of *fi. fa.* issued therefrom, pay the proceeds of sale of the Chastant notes into the said District Court, and that the same shall be divided ratably between the parties plaintiff and defendant, in proportion to the amounts of their respective judgments against Michel Hebert, in the same manner as if their seizures had been made upon the notes simultaneously according to their agreement.

It is further ordered, that the case be remanded to the District Court to apply the proceeds of the property of Michel Hebert, now subject to the claims of the parties to this suit, or what may remain due thereon, respectively, in accordance with the rulings of this decree. And it is finally ordered, adjudged and decreed, that so much of the judgment of the District Court as conflicts or is at variance with this decree, be annulled, avoided and reversed; otherwise, that it be, and is hereby affirmed. The costs of the appeal to be paid by the defendant and appellee.

Judge Labauve recused.

Rehearing refused.

David B. Fox v. Charles A. Weed.

No. 1450.—DAVID R. FOX v. CHARLES A. WEED.

A judgment and certificate of discharge by the Bankrupt Court will operate a perpetual bar to further proceedings in the State Courts against the bankrupt, on demands that existed before the decree. Bankrupt Act sec. 31, approved March 4, 1867.

APPEAL from the Sixth District Court of New Orleans, *Duplantier, J.* *T. M. McGill*, for appellant, *Sullivan, Billings & Hughes*, for appellee.

WYLY, J. This is an action for the value of two hundred cords of wood, which plaintiff alleges was taken by defendant from his plantation, in the parish of Plaquemines, in 1862.

Defendant pleaded the general denial, and the prescription of three years.

There was judgment in favor of defendant, and plaintiff has appealed.

Defendant pleads in this court that he has been adjudged a bankrupt according to the provisions of "An act to establish a uniform system of bankruptcy throughout the United States," passed by the Congress of the United States, and approved second March, 1867. He also files his certificate of final discharge granted on the thirtieth November, 1863, by the honorable United States District Court for the District of Louisiana.

We think the proceedings in bankruptcy and the final discharge of the defendant, Charles A. Weed, a complete bar to further proceedings in this court, and that this court has no further jurisdiction of the case, (Bankrupt Act sec. 34).

It is therefore ordered that this appeal be dismissed at the cost of appellant

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No. 1398.—ERASTUS F. CHANDLER AND AUGUSTUS B. CHANDLER v. ANTHONY BARRETT, Executor.

The rule that testaments are more easily avoided than contracts, on the ground of mental unsoundness, does not refer to the amount of intellect required in a testator. So far as the latter is concerned, a will may be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain.

Insanity is never presumed.

If a testament present a series of wise and judicious dispositions, the *onus* is upon the heirs who attack it to prove unsoundness of mind at the date of its execution.

If by facts occurring near the time of the date of the testament and preceding and following it, the heirs have proved an habitual state of insanity, then, and notwithstanding the wisdom of the will, the *onus* would be shifted on the legatee to prove the sanity of the testator during the intermediate time, that is, at the date of the testament.

If, however, no habitual state of insanity is established, and the acts of folly are rare, and occur at periods distant from each other and from the date of the testament, the testament, if not destitute of good sense on its face, will be presumed to be the offspring of a healthy volition and a lucid memory.

The opinions of medical men are received upon questions of professional skill; but they should state the facts on which such opinions are based, and the opinions themselves are not conclusive but must be weighed as other evidence.

APPEAL from the Second District Court of New Orleans, *Theard, J.* Fourth District Court, presiding. *J. P. Boyd* and *M. U. Dunn* for plaintiff and appellees, *Alex. T. Steele*, for defendant and appellant.

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HOWE, J. The plaintiffs in this case allege that they, together with a minor brother and minor sisters, are the sole heirs of Mrs. Christina Chandler, their father's sister, who died in New Orleans on the second of August, 1866. That on the twenty-fourth day of July, 1866, the deceased executed an instrument called and known as her last will and testament before A. Hero, Jr., notary, by which she bequeathed all her property to the defendant Barrett, constituting him universal legatee and sole executor; that the will has been admitted to probate upon application of the defendant, but that it is null and void for the reasons that at the time of making the will, and for many years prior thereto, the testatrix was totally disqualified and incapable of making a will; and also for other reasons, which having been abandoned by plaintiffs it is unnecessary to discuss. They pray that the will may be annulled and avoided, and that the plaintiffs with their minor brother and sisters may be adjudged to be entitled to inherit and possess the estate, and for general relief.

The defendant pleads the general denial; especially denies the relationship of plaintiffs' father; avers that the testatrix, "Christina Chandler, at the age of seventy years lived alone, uncared for and neglected by the plaintiffs who lived very near to her," and asserts that the deceased "when she made her will and until her death exhibited more than ordinary proof of sanity and capacity to do business."

There was judgment for plaintiffs and the defendant has appealed.

The only question in the case, in the view we have taken of it, is, whether Christina Chandler, on the twenty-fourth day of July, 1866, had testamentary capacity, or whether on the contrary she was intestable by reason of unsound mind? The question, we must say, is not very clearly presented by the pleadings, but it seems from the whole record to have been the main point at issue. And here we may remark that, while it is true as stated by this court in *Aubert v. Aubert*, 6 Ann. 106, and urged by plaintiffs at bar, that testaments are more easily avoided than contracts on the ground of unsoundness of mind, yet this distinction applies to such matters as those of notoriety and interdiction and not to the amount of intellect required in a testator. So far as the latter is concerned, a will may well be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain. It would be unreasonable to require that a testator should have more mental vigor and a more lucid memory than a person who makes a contract. (See *Merlin, Repertoire*, vol. 13, page 550; *Stevens v. Van Cleve*, 4 Wash. C. C. R. page 267; *Converse v. Converse*, 21 Vermont 168.

It appears from the evidence that Christina Chandler resided in Missouri in 1825; that her husband died in that year; that soon after his death she became the mother of a son Thomas W. Chandler; that in 1835 she removed to Vicksburg; where she remained until about

1850; that she then came to New Orleans and lived here with her son up to the time of his death in April, 1865; and that she survived him about sixteen months, managing his succession of which she was sole heir, and living alone in the same house in Canal street where she had lived for some time before. In considering the question of her alleged unsoundness of mind at the time her will was made there are some elementary principles which may guide us to a just conclusion. "The Roman law," says Com. Delisle (*Donations et Testaments*, page 82), "furnished rules on this point which still deserve to be followed. If the testament present but a series of wise and judicious dispositions, it is for the heirs who attack it to prove unsoundness of mind at the date of the testament. If it contain dispositions such as would cause insanity to be presumed, although susceptible of being justified by peculiar circumstances, it is for the legatee to prove by witnesses the sanity of the testator as against the terms of the testament. But if by facts occurring near the time of the date of the testament, and preceding and following it, the heirs have proved an *habitual state of insanity*, we are constrained to think that then, and notwithstanding the wisdom of the act, the legatee should be held to prove the existence of soundness of mind during the intermediate time. If, however, the acts of insanity were rare and occurred at periods distant from each other and from the date of the testament, the testament would sustain itself, and would be presumed to have been made in a lucid interval, at least *if the act was not destitute of good sense and betrayed no insanity.*"

"The presumption," says Toullier, "is always in favor of the act. Insanity is never presumed. The advanced age of the donor, the forgetfulness of his family, the largeness of the legacy, the low rank of the legatee, will not of themselves suffice to decide that the testator is not of sound mind." *Droit Civil*, vol. 3, p. 44. See also Marcade, vol. 3, p. 403, Duranton, vol. 8, p. 167.

"The presumption of sanity does not cease," says Troplong, "because the testator has experienced some transitory intellectual derangement at a time anterior to the testament." *Donations et Testaments*, vol. 2, p. 56. And the same writer animadverts with characteristic energy upon the tendency he has observed "to transform a morbid susceptibility, an ephemeral, excessive excitement, a superficial trouble, into one of those profound alterations which destroy the reason."

The English law seems to be the same upon these points. In the case of *Chambers v. The Queen's Proctor* (2 Curteis 415, cited by Ray, p. 272, and Jarman on Wills, vol. 1, p. 72), the deceased was an attorney who made his will on the fifteenth November, 1839, and committed suicide the next day. He labored under singular delusions, having no foundation in truth, on the three days next preceding the day on which the will was executed; among others that the benches of the Inns Temple were about to disbar him on account of an imaginary trivial

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fraud he had practiced on them, and that in consequence thereof he was a lost man and must be got out of the country. It appeared that delusions equally gross possessed his mind in 1838. But the court (Sir Herbert Jenner) said that the first point to be considered was whether *habitual* insanity had been proved, "because it is admitted that where habitual insanity does not exist the proof of actual insanity *at the time* the will was made must come from those who impeach the act. The court, therefore, must look for proof of habitual insanity or insane delusion from those who oppose this will;" there being no evidence of actual insanity at the moment the will was made, the court was of opinion that no habitual insanity had been proved, and the will was therefore sustained. (See also *Fulleck v. Allison*, 3 Hazzard 527.

In the common law States of our own country, the same general rules have been laid down. *Clark v. Fisher*, 1 Paige 174; *Jackson v. Van Deusen*, 5 Johnson 144; *Halley v. Webster*, 21 Maine 461.

Turning to the evidence in the record we find the principal acts of folly relied upon by plaintiffs to be that about the year 1850 or 1851, the testatrix, Christina Chandler, ran up on the roof of a house as if trying to escape from an imaginary robber; that about 1856 she had a delusion that her brother had killed seven men and cut them up and thrown them in a well; that "some time before the war" she took all her bed clothing and her clothes and burned them; that about 1863 she informed one of the witnesses that her son and a young lady had bought a large kettle and she believed it was their purpose to boil her up in it; that during the last illness of her son, about sixteen months before her own death, she was very miserly in her housekeeping, to his discomfort; that about two weeks before her death she offered to will her property to a neighbor, Mrs. Hannegan, if the latter would attend to her wants in the way of nursing, and afterwards offered to will it to Mr. Hefferon, another neighbor, if he would go in and take care of her during her last illness; that on another occasion, the date of which is not fixed, she had a fear of being poisoned by her son, and refused for a time to drink water from his cistern; that her habits were those of a miser, and that she was afraid of being cheated and robbed; that some time prior to September, 1861, calling at the house of the plaintiffs' father, Maryland K. Chandler, she would say when she came to the gate, "Maryland, will you kill me?" and he would jokingly reply "yes," and she would then call the witness her sister-in-law.

The plaintiffs also rely on the opinions of experts, but the experts do not seem to agree as to what was the character of Mrs. Chandler's mental aberration. They do not appear to have considered her imbecile nor afflicted with dementia. In their opinion the unsoundness took the form of mania of some kind. The judge of the court who recused himself and was called as a witness, thought her of unsound mind; that she seemed to distrust everybody except the Judge of the Second District Court, to have a morbid fear of being robbed and cheated, and to have "a mania for penurious conduct." He thought, however, that

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she knew how to keep her money, that she was not violent, and he did not deem it his duty to interdict her. He did not see her after 1865. The first medical witness thought her insane and seemed to lay much stress upon the delusion in 1863, in regard to her son, and her manner at that time, and her conduct when her son was ill in April 1865. He did not see her for about six months prior to her death except as he saw her passing in the street. The second medical witness declared that she "was afflicted with what is called moral insanity, which is characterized by cruelty to one's kindred." He did not see her after April, 1865.

We may here observe that while it is true that experts may give opinions, and that the opinions of medical men are freely received upon questions of professional skill, it is equally true that they ought also to state the facts on which those opinions are based, and that the opinions themselves are not conclusive, but must be weighed as other evidence. 5 La. 276; 4 Ann. 377; 1 Jarman on Wills 78.

We have given a careful consideration to the testimony of these experts, and are constrained to think that no habitual state of insanity has been established by it. Nor do we think the other witnesses have established such a state. Penuriousness or miserly conduct is hardly evidence of such a condition. The desire of the deceased to leave her property to her neighbors, provided they would nurse her in her last hours, seems to have been an effort to attract a kindly attention, and we might adopt in this regard the language of Chancellor Kent, and say: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities." *Van Alst v. Hunter*, 5 John. ch. 148.

The fear which Mrs. Chandler had of being robbed and cheated, we do not think unnatural in an aged woman who appears for upwards of a year before her death to have lived alone unvisited by a single one of her relatives. The plaintiffs and their mother do not seem to have seen her since 1861; although for the greater portion of the time from 1861 to 1866, they resided within three miles of her house. From the squalid style in which she lived it is as likely that the burning of bed clothing and clothes "some time before the war," that is at least six years before the will was made, was a sanitary precaution as that it was the act of a lunatic, and even if it was an act of Pyromania, it was never repeated in any form.

As for the delusions which perplexed her mind at different times during a period of sixteen years, it is to be observed that they were few in number, were not permanent in their character, and were separated from each other and from the date of the testament by long periods of

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time. They were undoubtedly morbid, and we may presume they indicated cerebral irritation at the time they appeared, but we find no trace of them in the evidence after the year 1863, and the will was made in 1866.

We are of opinion, therefore, that the plaintiffs have not overcome the presumption of sanity which must exist in favor of a will so rational as that of the testatrix in this case; and we are confirmed in this opinion by the testimony for the defense. We there find Mrs. Chandler, four weeks before her death, consulting a lawyer in regard to a suit which had been brought against her, and stating the facts to him with clearness and accuracy. Two days after she calls again upon her counsel, informs him correctly of her family relations, of the fact that she has no descendants, and states her desire to make a will so as to dispose of her property as she pleased. She mentions the fact that she knows Mr. Hero, and is advised to employ him as notary. On the day the will was made, Mr. Hero with these witnesses went to her house. She told him she desired him to make her last will and testament; she dictated to him the ideas as written down in the will; she told him that no one had taken care of her (meaning, doubtless, no one whose natural duty it was to care for her); that Mr. Barrett had, and would continue to do so. She then informed the notary that she had some money in the house, gold coin, which she did not wish to keep there as she had some time before been robbed of her paper money. She then went, with assistance, into the next room and brought a basket containing six or seven rolls of paper, in each of which she said there were one hundred dollars, except one which contained sixty dollars. The money was counted by the notary, and, as he says, proved to be in amount what she had stated. The money was then handed to Mr. Barrett for safe keeping, apparently, as she did not wish to keep it "there." She then told the notary that Mr. Barrett had constructed a tomb for her in one of the cemeteries (a fact elsewhere appearing in the evidence), and that as part of the consideration of his services, she desired to transfer to him certain vaults she owned, and the written transfer was thereupon made. The plaintiffs urge that this was an act of insane folly, inasmuch as she had given him already over six hundred dollars, gold, and had bequeathed him all her property; but we cannot so regard it. She had given him the gold for safe keeping, and as for the rest of her property it was uncertain when she would die, the defendant might not have come into possession for years, she might have used it up as well as the gold before her death, or she might have revoked her will. We think the act quite business like. The notary and the witnesses were in her presence about two hours. She seemed a very avaricious woman, who deprived herself of all the luxuries and many of what are generally considered the necessities of life, but to all of these four witnesses she seemed to be perfectly rational and to have an excellent memory. Her capacity for business, her determined

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frugality, her knowledge of her property and of her legal rights, her prudent administration of her son's estate for fifteen months prior to the date of the testament, appear elsewhere in the evidence both for plaintiffs and defendant. That she was very penurious and very eccentric is plain enough, but that she was habitually insane is something we cannot affirm. She had in former years, without doubt, on occasions separated by long intervals of time, suffered from irritation of the brain, but from the evidence we must deem it to have been of the transitory kind, which occurring long anterior to the time of the testament, does not cause the presumption of sanity as to that act to cease. If the plaintiffs had shown that before these isolated acts of folly occurred her habits of mind were different, and that these acts indicated a permanent and morbid change, if they had shown that the delusions which visited her at various times continued to manifest themselves in some form down to the time she made her will, as if the result of a chronic state, in short if they had brought themselves within the rule that where the insanity is proved to have been habitual, the burden of proof is shifted on the legatee, the result might have been different. But as the case comes to us, it seems to fall under the rule we have cited, that if the acts of insanity are rare and occur at periods distant from each other and from the date of the testament, the testament, if not destitute of good sense, and betraying no folly on its face, will sustain itself to be presumed to have been the offspring of a healthy volition and a lucid memory.

For the reasons given it is ordered and adjudged that the judgment appealed from be reversed and avoided, and that there be judgment in favor of defendant with costs in both courts.

Rehearing refused.

No. 1958.—THE STATE OF LOUISIANA, ex. rel. ELIZABETH ADAMS, Natural Tutrix, v. THE JUDGE OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF LOUISIANA.

The District Judge has no discretion in granting a suspensive appeal where the appellant tenders his bond with legal surety for an amount exceeding by one-half the amount of the judgment.

The rule laid down in Art. 574 of the Code of Practice, that the Judge shall fix the amount of the bond for a suspensive appeal does not relate to a suspensive appeal from a judgment for a specific sum. Where the facts show that the relator is entitled to a suspensive appeal, the Judge may be compelled by a writ of *mandamus* to grant the appeal.

APPEAL from the Second Judicial District of the State of Louisiana.
Pardee, J. Cotton & Leovy for relators, *Don A. Pardee* in personam.

LUDELING, C. J. The answer of the Judge of the Second Judicial District of Louisiana, shows that on the fifth day of December, 1868, a judgment was rendered dissolving an injunction in the suit entitled, *Elizabeth Adams, Natural Tutrix, v. Martin Dermody, F. J. Herron, United States Marshal, and A. H. De Meza*, with three hundred dollars

The State of Louisiana, ex rel. Elizabeth Adams, Natural Tutrix, v. The Judge of the Second Judicial District of the State of Louisiana.

damages and costs against the plaintiff and her surety on the injunction bond, *in solido*. The judgment was signed on the fourteenth of December last. Within the legal delay, a petition for a suspensive appeal from the judgment was filed and presented to the judge, who granted the order "upon the appellant giving bond, with good and solvent security conditioned as the law directs, *in the sum of forty-five hundred dollars.*"

The reasons given by the judge to justify his conduct are not sufficient.

Article 573 of the Code of Practice gives the appellant the right to a suspensive appeal, provided "he give his obligation, with a good and solvent security, residing within the jurisdiction of the court, in favor of the appellee, for a sum exceeding by one-half THE AMOUNT FOR WHICH THE JUDGMENT WAS GIVEN, if the same be for a specific sum."

The judge has no discretion in such matter.

Article 574 of the Code of Practice, which provides that the judge shall state at the foot of the petition the amount of the bond, does not relate to *suspensive* appeals from judgments for a SPECIFIC SUM. *Victor Duperron v. Van Wickle, Sheriff, et. al., 1 R. 324; Rachel v. Rachel, 11 An. 636; Surget v. Stanton, 10 An. 318.*

Nor is the discretion given to the judge by article 574 absolute and uncontrollable. He must exercise a sound legal discretion to attain the ends intended by the law, to wit, *the security of the costs only.*

The judgment appealed from was for three hundred dollars and costs. The bond for one thousand dollars, which was tendered, was sufficient, as it exceeds in amount by one-half the sum "for which the judgment was given."

Another reason assigned by the judge was that the Second District Court of the State of Louisiana had not authority to issue an injunction to restrain the Marshal of the United States from executing a writ, issued from the Circuit Court of the United States, and that the injunction was absolutely null and void, and therefore, no appeal can be taken from the judgment dissolving the injunction and awarding damages against the plaintiff. This is a *non sequitur*.

Whether the Second District Court had jurisdiction or not, the party cast in the injunction suit had a right to have the judgment reviewed by this court, on appeal.

It is therefore ordered that the mandamus issued in this case be made peremptory.

No. 1956.—STATE OF LOUISIANA, ex, rel. MRS. C. LYONS, Natural Tutrix, v. THE JUDGE OF THE SECOND DISTRICT COURT for the Parish of Orleans.

APPLICATION for a Mandamus. C. Roselius & Alfred Philips for petitioner for mandamus.

HOWELL, J. The relator asks for a peremptory mandamus, directing

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the Judge of the Second District Court for the parish of Orleans to grant a suspensive appeal from a judgment decreeing that widow Fry recover "from the succession of her late son, L. W. Lyons, the sum of fifty dollars per month from the death of her son, the same to be paid by the natural tutrix of her grand children, at the end of each month."

The judge answers that the monthly allowance being under five hundred dollars, no appeal lies, and that a suspensive appeal would be a denial of the relief granted imposed by law, and an irreparable injury to the party who is in necessitous circumstances. The latter grounds relate to the merits, which are not before us.

The petition for alimony was filed on the nineteenth of October, 1868, claiming a monthly alimony of one hundred dollars per month from the death of the son (seventeenth of April, 1867), and the additional sum of one hundred dollars per month to be paid monthly during the life of the petitioner, and judgment as above was rendered December 7, 1868.

It is manifest that the amount allowed by the judgment as due and exigible at the date of the demand exceeds the sum of five hundred dollars and is hence within the jurisdiction of this court.

The particular form in which the decree is written out, does not change the amount in dispute at the date of the suit as fixed by the decree itself. The aggregate amount of the monthly installments due by the judgment, at least at the date of instituting the suit, if not at the date of the judgment, can be safely taken as the amount in dispute.

It is therefore ordered that the mandamus issued herein be made peremptory, and the Judge of the Second District Court for the parish of Orleans directed to grant the relator a suspensive appeal from the judgment rendered by him on the seventh of December, 1868, in favor of widow Fry, and against the succession of L. W. Lyons, deceased, for alimony from the date of the death of said Lyons.

REPORTER.—This case merely involves a question of fact, as to amount of the interest, and presents the same points as the preceding, reported above—No. 1958.

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No. 1197.—WILLIAM D. SMITH v. CHARLES D. STEWART, et. al.

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The exchange of prisoners between the sovereign and the insurgent, engaged on the one side by force of arms to subdue the rebellion, and on the other to establish their independence, does not of itself constitute the insurgent a belligerent power.

The blockade of the insurgent ports by the sovereign does not constitute the insurgent a belligerent within the sense and meaning of the term "belligerent" as used in international law, because the sovereign might accomplish the same result by interdicting commerce through those ports by municipal regulations.

The fact that a revolted province or portion of a country may have acquired the status and position of a belligerent power does not *ipso facto* give it the position and status of a *de facto* government. A government *de facto* arises only where the established government has been subverted by successful rebellion, and the new government exercises undisputed sway for the time being over the entire country.

In the late conflict between the United States and the so called Confederate States, before the Confederate States could have claimed the distinction of a *de facto* government, it was necessary for them to show undisputed control over the whole country claimed, with the ability to maintain that position.

A recognition, by any other independent power, of the Confederate States as an independent power before they had demonstrated their ability to maintain their new government would have been a *casus belli* between the United States and such power.

ON MR. CHIEF JUSTICE LADELLING'S OPINION—ON REHEARING.

Prescription runs against all persons, except such as are included in some exception established by law. C. C. 3187. The existence of war is not among the exceptions established by law that will work an interruption or suspension of prescription.

The inability to sue will not avail against the plea of prescription, except in the cases specially excepted by law. C. C. 2312, 3483.

The maxim *contra non valentem agere non currit prescriptio* has no application in our system of jurisprudence. Where the Legislature has prescribed rules regulating prescription, and enumerated the causes that interrupt or suspend prescription, the courts will admit no other exceptions than those made by the law.

A PPEAL from the Parish of Pointe Coupee, Seventh Judicial District, Cooley, J. Race, Foster & E. T. Merrick and A. Provosty for plaintiff and appellee; Edward Philips for defendant and appellant.

TALIAFERRO, J. The plaintiff in this action alleges that the defendant Charles D. Stewart and eight others in April, 1862, destroyed by fire two hundred and seventy-five bales of cotton, the property of plaintiff, which he avers were worth eighty-five thousand dollars. He prays judgment *in solido* against the defendants for that sum with interest and costs.

The defendants filed separate answers. In the court below, the case was continued as to all the defendants except Stewart, between whom and the plaintiff the present controversy lies. Judgment was rendered in favor of the plaintiff for twelve thousand dollars, and the defendant appealed.

The defendant's answer denies that the cotton belonging to plaintiff was burned at the time specified; and avers that if it were, it was burned by the militia of Pointe Coupee parish, acting under orders from the regularly constituted authorities of the State, and specifies as constituting those authorities the Governor, in his capacity of commander

in chief of the army and navy of the State, and of the militia thereof, and others, subordinate officers of the militia of the State; as well as by the authority of and under the orders of the officers of the Confederate States Government, whose orders and authority were at that time obligatory and binding upon the defendant, and which he was compelled to obey. He avers that at that time the militia of the parish were acting under orders from the commander in chief; that he was compelled to be a member of the regiment of Pointe Coupee militia, and that as such, nothing was done by him except what he did by the orders of officers whose commands he could not disobey. He pleads the prescription of one year in bar of the plaintiff's action.

The issues made in this case are—

First.—Is the action prescribed?

Second.—Was the authority under which the defendant acted a lawful authority?

Third.—Did he act under compulsion?

And *first* as to the question of prescription.

The learned and able opinion delivered in this case by the judge *à quo* enables us without difficulty to arrive at a satisfactory conclusion under this head. It is shown that from the time of the capture of New Orleans by the national forces in April, 1862, a continuous state of alarm and agitation prevailed in the parish of Pointe Coupee and the adjacent country, during the remainder of the war. Especially from the beginning of the year 1863 to the spring of 1865, the parish of Pointe Coupee was scourged by alternate raids of the military forces of both the hostile parties. Battles and skirmishes were frequent; while that state of affairs continued the people were panic stricken from the danger with which they were surrounded. Perturbation and terror were in the ascendant. In that district of country at that time the Ciceronian maxim "*Silent leges inter arma*," was fully illustrated. It is shown that during the year 1862, after the plaintiff's cause of action arose, there was only one term of court held in the parish, and that that was a mere formal opening of the court without the purpose of transacting business. That there was no court held during the years 1863 and 1864; and that the first court held afterwards was at the December term, 1865, under the Constitution of 1864; there having been but the one court, and that a mere nominal one, from the twenty-ninth of April, 1862, to the first Monday of December, 1865. It is shown that the defendant, shortly after the burning of the plaintiff's cotton, removed to Texas, where he remained three years. The petition in this case was filed on the third day of January, 1866, and the citation served on the fourteenth of March of the same year. But were the officers and the judge of that court, whose sittings were of such rare occurrence, officials deriving their commissions and authority from a legal source? It is contended that the contrary has not been proved, and admitting

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the court to have been incompetent, still the plaintiff by diligence might have filed his suit and had citation served and thus have been enabled to save his claim from prescription. By the expression "of competent jurisdiction or not" in article 3484 of the Civil Code, relied upon by the defendant, we understand courts of constitutional and legal origin, although incompetent as to jurisdiction of the subject matter. It is shown that the State in its then abnormal condition, passed an edict by which suitors who had not sworn allegiance to the Confederate authorities, were prohibited from instituting suits in the courts; and from this the political status of the officers of these courts may readily be inferred. In view of the confusion and dismay of the time and the general distraction of the country, it is not reasonable to expect diligence to be used in the prosecution of legal rights. In the furor and excitement of that period, the closing of the courts, of more than doubtful legality if open, and the general neglect of all business, except that of war, it would have been a vain and useless thing for the plaintiff to institute an action; and had it been practicable, it doubtless would have brought odium if not danger upon him to have instituted the present action.

We think the evidence fully warrants us to determine that in this case there was a suspension of prescription under the equitable principle invoked by the plaintiff, *contra non valentem agere non currit prescriptio*.

It is in consonance with the spirit of our laws and the jurisprudence of the State to recognize the rule where facts obviously show the equity of its admission. 11 An. p. 730 and cases there cited.

Second.—Was the authority under which the defendant acted a lawful authority?

This inquiry, seemingly, though we apprehend not necessarily, involves the consideration of the much mooted question, did the late Confederate States constitute a government *de facto*?

We regard this question rather as a political than a legal one. It does not in our view come properly within the range of judicial action. Courts should be governed in questions of this character by the authoritative declarations of the national government. Authorities are not wanting to sustain this opinion. But, it is urged upon us that the action of the general government during the war towards the States lately in rebellion, was such as to recognize them as a belligerent power, and as having a government *de facto*; and that they have been so acknowledged by other powers. This subject has been pressed upon our consideration with much ability and zeal in this case, as well as in others, and we deem it proper to examine it.

In entering unwillingly upon this task, we shall first inquire into the character of this alleged recognition of the late Confederate States as a belligerent power by the United States government. When inde-

pendent powers, governments *de facto et de jure*, engage in war against each other, they are called belligerents. Certain recognized rules and usages applicable to their condition of hostility and to their relations to neutral powers are called belligerent rights. The terms belligerents and belligerent rights are properly applicable only to sovereign powers engaged in war. In all other cases they apply *sub modo*, and in a limited and qualified sense. In the case of sovereign powers engaged in war they recognize each other as sovereigns. In the case of rebellions where one party strives to obtain its independence and the other to reduce the insurgent to obedience, no such recognition occurs. Yet, in the latter case, modern warfare admits, in the interest of humanity, the humane treatment and exchange of prisoners; a concession to that extent, of a belligerent right in favor of the insurgent power. In blockading the Southern ports during the late war the United States government chose to exercise a belligerent right, when as a sovereign, it might have accomplished the same object by interdicting commerce through those ports by municipal regulations. This act of blockading the Southern ports and the exchange of prisoners are construed into a recognition by the United States of the alleged status of the Confederate States as a belligerent power. But constructive belligerency and constructive governments *de facto* are novel elements of international law, and not yet incorporated we imagine in the law of nations even in "its newest state." What is the evidence that the late insurgent States were ever recognized as constituting a *de facto* government either by the United States or any other power? It is not shown, nor, we imagine, can it be, that any formal declaration of such recognition has ever been made by any government, by the issuing of any proclamation or State paper importing a national act. No ambassador, minister plenipotentiary, charge de affairs or other functionary of that order was ever sent to Richmond to treat with the government of the Confederate States. No official of that character, sent by the government of the Confederate States to foreign powers was ever recognized and received in that capacity. If Lord John Russell, in speeches before political meetings, spoke hopefully of the Confederate cause; and if now and then, a member of Parliament said in his place that the Confederate States were a government *de facto* and ought to be recognized, it was matter of but little import. Whatever else may have been said or done in England or in France touching these matters, it is certain that no solemn act of either government was ever announced declaring the Confederate government a government *de facto*.

Conceding, however, that the Confederate States were a belligerent power, did that constitute them a government *de facto*? Certainly not. It is contended nevertheless that its *status* was that of a *de facto* government because the insurgent States established a government and exercised jurisdiction over the country which they embraced. In ex-

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amining this proposition, we must look dispassionately at the stern array of facts that come within the field of view.

What then is a government *de facto*?

A government *de facto* arises only where the established government has been subverted by successful rebellion, and the new government exercises undisputed sway for the time being over the entire country; or, where the people of any portion of a country subject to the same government, throw off their allegiance to that government and establish one of their own; and show, not only that they have established a government, but also their ability to maintain it. This principle is founded upon reason and the fitness of things, and is therefore a rule of international law. The recognition of the government of a revolted State or province by a neutral power, is *casus belli* for the sovereign claiming dominion over the revolted country, if such recognition precedes the exhibition by the newly formed government of its ability to maintain its independence. Where recognitions of revolted States have occurred without this manifestation of the ability to sustain their new condition, they have been simply interventions with the intention of war.

During the cruel and fanatical war waged against the Netherlands by Philip the Second of Spain, England recognized their independence for the purpose of becoming a party to the war; fearing that if the Netherlands were subdued, both the government and church of England would be in danger from the power and fanaticism of Philip. What has been the uniform usage of nations on the subject of recognition? Numerous examples might be given. A few will suffice. When in 1778, France entered into treaties of alliance and commerce with the British North American colonies, then in a state of revolution, she adopted these measures upon the express declaration that "the people of these colonies were in the public possession of their independence, and *above all* that their former sovereign had shown by long and painful effort the impossibility of reducing them to obedience."

The uniform course of the United States towards the various provinces of Spain on the American continent, which, from time to time, within the last half century, have been in a state of revolt, has been scrupulously to abstain from the recognition of any of them as *de facto* governments until Spain herself had abandoned the contest, or it became morally certain that her power could never be reinstated.

Now, at what time did the insurrectionary States, in the late unhappy conflict, exhibit to the world their ability to maintain their so called government against the gigantic power of the United States? If they never did this, the claim set up for them as a *de facto* government must fail. Aside from the fact of their inability to maintain the government they set up being proved by the actual failure, it may justly be said that the result of the conflict was apparent from the beginning. What are the facts? The Southern States revolted and established a govern-

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ment founded as they declared upon the great principle of slavery, and with the avowed purpose of perpetuating it. They did this in defiance of the moral sentiment of all Christendom. They had, no doubt, the good wishes of the few who yet remain hostile to the march of liberal sentiment, and who cling to the idea of the divine right of kings. But on which side in the fearful strife were the sympathies of the masses of mankind? True, the Confederate States had a constitution, a congress, a president, officers of state; but to what purpose were these things, without the power to uphold them? One-half the population of the revolted States was ready at any moment when the opportunity occurred to rise in opposition to the new government, as all sane men knew it would do. No inconsiderable number of the other half helped also to swell the armies of the Federal government. Spread over an immense extent of country, and occupying at first all the strongholds within the arena of war, the weaker party were enabled to maintain the unequal contest for several years; but was it the less certain how it must terminate? Cut off from all intercourse with foreign countries by a powerful navy, the exhaustion of the country was slow indeed but gradual and certain. A merciless conscription which dragged into the Confederate ranks all the efficient men of the country, was wholly inadequate to supply armies to repel the outnumbering forces that were advancing in every direction. The desertion of the laborers left the fields uncultivated. Without money, without manufactures, and without producers, food, clothing and the munitions of war began to fail. No intervention by any of the powers of Europe was to be expected. The public sentiment of England, in unison with that of the sovereign, restrained the ministry; while the judgment and caution of Napoleon kept him from venturing alone upon a measure by no means free from hazard, in view of his tenure of the throne of France, and of the well defined position of Russia touching intervention by any of the European powers.

In juxtaposition with this state of things, it was seen that upon the white basis the population of the loyal States was more than fourfold that of the Confederate States. From that population the Federal forces were not only continually recruited, but continually increased. Abounding in manufactures of every kind, with producing capacities unexampled in the history of any people; with money and credit commensurate with the exigencies of the crisis, the armies of the Federal government were better clothed, better fed, better armed and better paid, than the same vast number of men going forth to war, have ever been, in ancient or modern days. With these facts glaringly before the eyes of the world, can it be said that the Confederate States at any time exhibited their ability to maintain the government they established?

The advocates of the proposition that the Confederate States were a *de facto* government resort to English history for authorities to support their position. We think they are not fortunate in doing so. During the long continued wars carried on by the rival houses of York and Lancaster, when the kingdom was in turn held by the one or the other of the parties, *de facto* governments were alternately established, because intervals of long duration occurred between these alternate occupations of the crown, and during which all strife had ceased. Such was the case during the usurpation of Cromwell. He was in the undisputed possession of the government for a long period, during which he had no opposition. For this reason the Cromwell government was a *de facto* government; and we do not see that it proves anything that Sir Matthew Hale, an undoubted loyalist, held office under it, and that he afterwards held office under Charles the Second. The words of Lord Hale, quoted with such confidence are very significant on this point. He says: "the right heir of the crown during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king within the act, on the subject of treason." The authority of Sir Michael Foster is also to the same effect. He says: "a king even *de facto* in the full and sole possession of the crown, he is a king within the statute of treason." It is clear that all these examples drawn from English history, and the authorities cited, make good the premises we have laid down. They all show conclusively the conditions to be absolute and plenary possession without interruption; and no possession of the realm in the adverse claimant. It is matter of history that these conditions were not fulfilled in the case of the Confederate government. From a very early period of the contest the Federal occupation of territory within the limits of the Confederate States was gradually extended, until the whole country was occupied, or at least, until the Confederate authority was entirely subverted. We conclude finally that by the principles of international law, and the general usage of nations, the late government of the Confederate States did not attain the status of a government *de facto*. The authority then set up under the government of the late insurgent States was illegal and void. It cannot therefore avail the plaintiff.

Third.—The third inquiry is, did the defendant act under compulsion? The evidence sufficiently discloses that he was a willing and ardent soldier in the war against king cotton. We think he rendered willing rather than compulsory service. But it is no where shown by the record that he was actuated by malice or ill feeling against the plaintiff. It is true that he acted in the matter of cotton burning conjointly with the other defendants under a militia officer; but we are rather inclined to think that the militia was a kind of machinery introduced with the view of giving an apparent legalization to the predetermined acts of those who advocated the ruinous policy of destroying cotton. But it is contended that the skirts of the defendant are not free from the flame and smoke of the burning staple. One witness says that the plaintiff set fire to some of his own cotton. It is shown that he caused

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cotton bales to be hauled out from under his gin, to have them in readiness for the cotton burners when they arrived, and that he advocated the burning of cotton. The testimony of the one witness in regard to the plaintiff's burning a part of his own cotton appears to have been disregarded on the trial below; and that portion of the testimony showing that he was in favor of the destruction of cotton to prevent its falling into the hands of the Federals also shows that he held it premature to burn cotton at that time. It is clearly established that when the torch was about to be applied to his cotton, he protested against the act and earnestly requested time to remove it out of the way of the enemy, stating that he expected a boat in a short time by which he intended to send his cotton up the river, far in the interior.

There is another feature in these transactions worthy of notice. The proclamation of Governor Moore directed the burning of all cotton within the limits of the State, which was in danger of falling into the hands of the Federal forces, and provided that where it could be removed out of their reach, that it should be done. This clothed the militia officers with a margin of discretion, which (as they acknowledged the legality of the order) it was their duty to exercise with propriety and judgment. It is not shown by the record that there was danger at all of the capture of cotton by the Federals; on the contrary, it appears that when their vessels of war went up the river, none of the cotton remaining was taken by them! Neither is it shown that at the time the plaintiff's cotton was burned there was immediate and imminent danger of its capture; so that the plaintiff was deprived forcibly of the benefit of the proclamation, which gave him the privilege of removing his cotton if he were able to do so. The party acting under the illegal authority by which defendant seeks to shield himself, certainly appears not to have exercised a sound discretion in their proceedings, carried on as they were, under mistaken zeal and remarkable delusion.

This case was tried in the court below before a jury. The verdict was against the defendant. We find nothing in our review of the case that authorizes us to alter it.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

MEMORANDUM OF AUTHORITIES CITED BY E. T. MERRICK ON ARGUMENT—ON REHEARING.

The charge of the Judge is correct and is good law. C. C. 2295, 2296.

If it were calculated to mislead, which it is not, still a new trial ought not to be granted because the facts warrant the verdict. Hennen's Dig. pages 97, 99; Nos. 1, 11, 15, 16, 24, 27, 32, 35, 37.

Governor Moore had no authority to authorize any one or *justify* any one in burning the cotton of the people. The Constitution of 1852 under which he was acting gave him no such power. Defendant filed a *justification*. His warrant fails him. *His answer calls it a rebellion.*

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Even a *de facto* government cannot grant away the public domain, much less take the property of citizens for the purpose of opposing the government *de jure*. See *Garcia v. Hatchell*, 8 N. S. 398, 401. 12 Peters 522, *Garcia v. Leo*.

In a lawful government "all instructions from the executive which are not supported by law are illegal, and no inferior court is bound by them." *Brightly's (New) United States Digest of Decisions*, p. 144. Sec. 86 and cases cited.

Prescription, 4 Sarigny, p. 426, Berlin Ed.

(2) "The *utile tempus* is only applicable to such periods of time which are established by general laws and not those established by the will of individuals as where the Judge has fixed a delay in the progress of a suit."

(3) "The *utile tempus* does not avail in all the cases which we have here mentioned but only where the prescribed period of time is a year or less, never when it has reference to more than a year.

"This rule does not need any proof, for only two prescriptions, a year and one hundred days come under it *and for both it is incontestable*." See Mackelday, Brussels Ed., p. 102, p. 111. See Stat. at Large, 12 vol. 590, 1262.

Quia tractatus de utilibus diebus frequens est videmus quid sit experiundi potestatem Rabere. 1, 44, 3.

"Because it is frequently discussed as to what are *useful days* we will see what is meant by having the power to prosecute one's rights.

It is in the first place necessary that the person shall have the ability to institute a suit *factus agendi*. It is not sufficient that the *defendant* presents himself, or has some one in the place who shall be capable of defending him; there must not be any cause which prevents the *plaintiff* from instituting his action. (*Nulla idonea causa, impediater experire*). Thus, if he is a prisoner or with the enemy, or absent on account of the republic, or in bonds (*in vinculis*) or if he is detained in another place, or in another country (*regione*) by bad weather (*temperata*), so that he can neither come or send a mandate to another to sue for him, he is considered as not having the ability to act (*experiundi potestatem non Rabet*). It is clear that he who is sick, but still able to employ another in his case has the power to act. No one will doubt that a person has not the power of acting who cannot be heard before the pretor. Those days only are considered useful on which the pretor renders justice." Dig. Lex. 1. Lib. 44. Pet. 3.

ON REHEARING.

LUDELING, C. J. The question to be considered first, is that raised by the plea of prescription.

The acts complained of were committed on the twenty-ninth of April, 1862; the citations in this suit were served on thirteenth and fourteenth of March, 1866. The prescription of one year, barring actions resulting from offenses or *quasi* offenses, had accrued, therefore, unless it was *interrupted* or *suspended*. It is not pretended that there was any interruption of prescription.

But it is alleged that the prescription *was suspended* from the date of the commission of the act which injured the plaintiff, until the fifteenth of June, 1865, by reason of the existence of war and civil commotion in the country, and the impossibility to sue the defendants before the re-organization of the courts, after the cessation of hostilities, and the maxim, "*contra non valentem agere non currit prescriptio*," is invoked.

The textual provisions of the Civil Code, on the subject, seem plain and unambiguous; and if the question were now presented for the first time for adjudication, there could not be much room for doubting how to determine it. Article 3420 declares, "Prescription is a manner of acquiring property and *discharging debts by the effect of time, and under the conditions* REGULATED BY LAW." Article 3487 declares "Prescription *runs against all persons*, unless they are included in some exception *established by law*."

The exceptions are enumerated in the Code. The existence of a state of war is not among the exceptions *established by law*, neither is the inability to sue, except in a few instances expressly mentioned. C. C. 2512; 3488 *et seq.*

It is manifest, therefore, that the rule "*contra non valentem agere non currit prescriptio*" is not recognized in the Code, except in cases expressly mentioned.

But, notwithstanding the plain and positive provisions of the Code, our predecessors have, in some instances, recognized the maxim, and under its equitable rule have relieved parties against whom prescription was pleaded. As might have been expected when Judges depart from the plain provisions of written law to decide according to the equity or necessity of each case, conflicting opinions have been the result. And so long as courts continue to act under the notion, that their equity powers authorize them to correct, control, moderate or supersede the law, with the view of enforcing rights which are just, great uncertainty and confusion will ensue; and as Mr. Justice Blackstone says, courts of equity "will rise above all law, either common or statute, and be most arbitrary legislators in every particular case."

In *Rabel v. Pourciau*, it was held that "this court has settled a different jurisprudence in regard to *the proceedings in actions on bills of exchange and notes payable to bearer or order, etc.*, and has held that the maxim '*contra non valentem*' resting solely on jurisprudence cannot be applied to such a prescription, *without violating the manifest spirit and intention of express law*; that that prescription running against minors and interdicted persons, thereby indicated the policy of the law maker, and his intention that it should be strictly enforced."

We reiterate that the maxim cannot be applied to suspend the course of prescription against bills of exchange, notes, etc., because it is in opposition to the plain and positive provisions of the Civil Code.

But it is equally a violation of "the manifest spirit and intention of express law," to permit the maxim to apply to the prescription of actions for damages, resulting from offenses and *quasi* offenses.

Article 3506 says: "The prescription mentioned in the preceding article, and those prescribed above in the first and second paragraphs run against minors and interdicted persons, reserving, however, to them their recourse against their tutors and curators. *They run also against persons residing out of the State.*"

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The prescription pleaded in this case is mentioned in the first paragraph of section third, chapter third of the Civil Code, and therefore, that prescription also "running against minors and persons interdicted," and "persons residing out of the State," it is manifest that the legislators did not intend to permit the application of the maxim to it, any more than to the prescription against bills of exchange, etc.

The rule "*contra non valentem*" is applicable to both classes of cases, or to neither. We think it is not applicable to either. *Hatch v. Gilmore*, 3 An. 510.

Our attention has been called to the opinion of the Supreme Court of the United States in the case of *Hanger v. Abbott*, 6 Wallace, p. 542, in which that august tribunal held, that "the rule of the present day is that debts existing prior to the war, but which made no part of the reasons for undertaking it, remain entire, and the remedies are revived with the restoration of peace."

That this *should be* the rule we believe, but that it *is* the rule, we doubt. And we are sustained in our view of the law by the high authority of the Supreme Court of the United States. In *McElmoyle v. Cohen*, 13 Peters 327, the court said: "It would be strange if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been from remote antiquity fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our States, under our system, exercise this right in virtue of their sovereignty?" In *McIver v. Ragan*, 2 Wheaton, p. 28, it was admitted that the case was within the act of limitations of the State of Tennessee, and not within the letter of the exceptions, and Chief Justice Marshall, as the organ of the court, said: "Wherever the situation of a party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the exception. It would be going far for this court to add to those exceptions."

In the case of the *Bank of the State of Alabama v. Dalton*, reported in 9 Howard, p. 250, the defendant was sued on the very day he moved into the State of Mississippi. The statute of limitations was pleaded in bar of the suit; and the plaintiff insisted that as the laws of Mississippi did not operate on either plaintiff or defendant, nor on the foreign judgment, until the day on which the suit was brought, no bar could be interposed, founded on the lapse of time, as none had intervened. Here, it would seem, was a case where there had been no *utile tempus*, and in which the maxim "*contra non valentem agere non currit prescriptio*," might be applied, if courts were at liberty to supply it. Yet neither the Mississippi court, nor the Supreme Court of the United

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States, would relieve the plaintiff under that rule. The Supreme Court of the United States held, that "the acts of the Legislature furnish rules of decisions," * * * "the question is one of legislative power, and not of practice." * * *

"*The act itself makes no exception* in favor of a party suing under the circumstances of these plaintiffs. So the Supreme Court of Mississippi held in the case of *McClintock v. Rogers*; and this is manifestly true on the face of the act. *The Legislature having made no exception, THE COURTS OF JUSTICE CAN MAKE NONE, as this would be legislating.*" And after having reaffirmed what was said in *McIver v. Ragan*, already quoted in this opinion, the court declared "*The rule is established beyond controversy. It was so held by the Supreme Court of New York in Troup v. Smith, 20 Johns. 33; and again in Callis v. Waddy, by the Court of Appeals of Virginia, and also in Hamilton v. Smith, by the Supreme Court of North Carolina, and in Cocke & Jack v. McGinnis, in the Supreme Court of Tennessee. Nor are we aware that, at this time, the reverse is held in any State in this Union. It is the doctrine maintained in Stowell v. Zouch, found in Plowden's Reports 353, and not departed from by the English courts, even in cases of civil war, when the courts of justice were closed, and no suit could be brought.*" "As the act of limitation has no exception that the plaintiff can set up, and as none can be implied by the courts of justice, * * * it is our duty to affirm the judgment." 9 How. 250.

And Mr. Marcade commenting on article 2251 of the Napoleon Code, corresponding with article 3487 of our Civil Code, alludes to the great confusion and uncertainty which anciently existed in France on the subject of the suspension of prescription, in consequence of the application by judges and authors of the rule "*contra non valentem*," and he remarks, "*Le Code a porte remede a cet etat de choses, et prevenu tout danger de ce genre pour l'avenir, en declarant formellement, par notre article 2251, que la prescription court contre toute personne qui ne pent pas invoguer une exception estable par la loi. Ainsi c'est desormais la loi qui sera le seul guide a suivre; les considerations d'equite qui eussent per entrainer aujourd'hui tel esprit et demain tel autre seront sans valeur; et toutes les fois qu'on se demandera si tel cas, a raison de sa gravite, ne doit pas etre regarde comme mettant a l'abri de la prescription, il ne s'agira, pour repondre, que de voir si ce cas ventre ou non dans l'une des exceptions posees par le Code.*"

And he concurs with M. Duranton and M. Coins-Delisle in their views that war, pestilence and other cases of *vis major*, are expressly excluded from the causes which suspend prescription, by the terms of the article. Marcade Prescription, p. 150. Rev. de dr. franc. et etrang; 1847, p. 285-302. Duranton, Nos. 285, 286.

So we think. "Prescription runs against all persons, unless they are included in some exception established by law." Art. 3487, C. C.

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The Legislature of this State might have established an exception to meet the contingencies of this case, but they have not; and though the plaintiff, and those similarly situated, may exclaim, in the language of M. Marcade "*dura lex, mais il faudra toujours ajouter, Scripta tamen.*"

If our Code has furnished us a rule, it is imperative, even though it be shown to be defective, and grave and weighty considerations of policy are appealed to in favor of another. The remedy is in the hands of the Legislature. 16 La. 394.

This view of the case renders it unnecessary to notice the bill of exceptions taken to the charge of the District Judge; and in other respects the former opinion rendered in this case meets with our approbation.

It is therefore ordered and adjudged, that the decree of this court, rendered on the twenty-fifth of February, 1867, be avoided, that the judgment of the District Court be annulled; and that the verdict of the jury be set aside. It is further decreed that there be judgment in favor of the defendants, and that the plaintiff and appellee pay the costs of both courts.

REPORTER.—The first opinion in this case was pronounced by Mr. Justice Taliaferro of the Supreme Court, organized under the Constitution of 1864, in which the maxim *contra non valentem, etc.*, was applied. A rehearing was granted and the case was transferred to the present Supreme Court, organized under the Constitution of 1868. Chief Justice Ludeling confined his review on the rehearing to the plea of prescription, overruling the former decision on that point and thereby reversing the former decree. It may here be noted as an index of the progress of judicial opinion on the question of prescription, that two of the judges of the present court, Messrs. Taliaferro and Howell, were members of the Supreme Court immediately preceding this, both of whom were on the bench at the time the first opinion in this case was pronounced, and both of whom now concur in the new doctrine established on the suspension of prescription.

No. 2036.—HENRY FRELLSEN v. F. C. MAHAN, TAX COLLECTOR.

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The term "each house" used in articles 33 and 42 of the Constitution of 1868, means a majority of the members elected to either body.

Four-fifths of a quorum of each House may dispense with the rule requiring any bill to be read on three several days.

The act of the Legislature, No. 114, approved on the twenty-ninth of September, 1868, levying a tax of one per cent. on the cash value of all the immovable and movable property in the State, according to the assessment rolls for the year 1867 (being the last assessment which at that time had been made), is not retrospective in its operations, and does not therefore conflict with article 110 of the Constitution of 1868.

The selecting the assessment of 1867 (the last one then made), as a basis for a tax, levied in 1868, was a subject which was exclusively within the legislative control. The principle of equality and uniformity enunciated in article 118 of the Constitution of 1868, is not violated by selecting a previous assessment of the property taxed as a basis of estimate of the amount of taxes to be collected.

APPEAL from the Seventh District Court for the Parish of Orleans, Collens, J. Breaux & Fenner and Campbell, Spofford & Campbell for plaintiff and appellee. S. Belden, Attorney General, H. C. Dibble, John B. Robertson and W. H. Hunt for defendant and appellant.

ARGUMENT FOR PLAINTIFFS IN INJUNCTION.

The first question raised by the injunction is, whether the Act No. 114 of the Louisiana Legislature, approved September 29, 1868 (Sess. Acts, p. 149), was passed with the forms and solemnities required by the Louisiana Constitution of 1868.

That Constitution in article 42, declares that "no bill shall have the force of a law until on three several days it be read in each house of the General Assembly, and free discussion allowed thereon, unless four-fifths of the house where the bill is pending may deem it expedient to dispense with this rule."

This provision is imperative and vital, not directory simply. It was said in the *People v. Lawrence*, 36 Barbour 177, that "no court in New York has yet felt itself authorized or constrained to regard any provisions of the constitution as merely directory."

And in *Supervisors v. Heenan*, 2 Minnesota 330, it was declared that "the validity of legislation depends upon a pursuance of the constitutional provisions in the enactment, *as that the law shall be read on three successive days*, shall be voted for by a majority of all the members, etc., etc., and the court may inspect the original bills at the Secretary of State's office, and have recourse to the legislative journals."

In *Fowler v. Peirce*, 2 California 165, it was held that the court may receive other evidence than the record to determine whether a statute was *passed* or approved in accordance with the constitution.

In the *People v. Purdon*, 2 Hill, 31, Bronson, J. and others held that the court could go behind the statue book and inquire whether an act coming within the two-thirds clause of the constitution of New York was passed by the requisite number of votes, notwithstanding a certificate of the Secretary of State. Justice Bronson, in that case, well remarked: "If we wish to perpetuate and uphold free institutions, we must maintain a vigilant watch against all encroachments of power, whether arising from mistake or design, or from whatever cause they proceed." His views met the approval of the Court of Errors, in the same case, *Purdon v. The People*, 4 Hill, 334, and especially of Chancellor Walworth, they holding, with great unanimity, that the certificate of the Secretary of State was not conclusive that the act had passed by the constitutional majority.

In *Fowler v. Peirce*, already cited from 2 California 163, Chief Justice Murray said: "I am of opinion that there is no difference between declaring a law unconstitutional for matters patent upon its face, though passed regularly, and a law apparently good, yet passed in violation of those rules which the constitution has imposed for the protection of the rights and liberties of the citizen. If such matters cannot be inquired into, the wholesome restrictions which the constitution imposes on legislative and executive action become a dead letter, and courts would be compelled to administer laws made in violation of private and public rights, without power to interpose. The fact that the law-making power is limited by rules of government, and its acts receive judicial exposition from the courts, carries with it, by implication, the power of inquiry how far those exercising the law-making power have proceeded constitutionally." And again (p. 171): "Our constitution has wisely so distributed the powers of government as to make one a check upon the other, thereby preventing one branch from strengthening itself both at the expense of the co-ordinate branches and of the public."

Now let us examine the questions of fact, whether the Act No. 114, when it was in the form of a "bill," was read in each house on three several days, and if not, whether this constitutional requirement was dispensed with by four-fifths of the house where the bill was pending.

The evidence of these facts, if they be facts, must necessarily be of the highest authenticity, that is, *record* evidence, the affirmative evidence

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of the journals of each house. For the constitution has not left the grave proceedings of the law-making department to rest in parol or upon inference, but requires that "each house SHALL KEEP and publish weekly a journal of *its proceedings*," art. 36. That means not a *part* of its proceedings, but all of them; and what more solemn "proceeding" can a house take than that of complying or dispensing with a provision of the constitution itself—a provision based upon a profound regard for the public weal? Unless this solemn "proceeding" appear affirmatively upon that record which each house "shall keep," it is an inevitable conclusion of law that the proceeding never took place. Here the maxim applies in all its force, "*idem est non esse et non apparere*." The record may, perhaps, upon proper allegations of fraud, etc., be impeached by parol, but it can never be supplied by parol, save in case of loss or destruction, nor can a fact of which written or record evidence is required be eked out by a presumption.

But it was not pretended even in argument, that the bill under consideration was read on three several days in the House of Representatives. It was not so read. But it is pretended that this provision of the constitution was dispensed with in that house by the requisite four-fifths, and that the journal shows it. This we deny.

The printed House journal (which, for this argument, we admit to be a correct copy of the original produced in court upon our call) shows that, on the fifth August, 1868, a quorum of only 52 out of 101 members being present at the opening (p. 96), Mr. Morey, of Ouachita, gave notice (p. 100) of a bill under the name of "an act levying a special tax to provide for the payment of the past due interest on the bonds of the State, outstanding warrants, certificates of indebtedness, and Convention warrants." According to the routine which the House had prescribed for itself by its own rules, nothing more could have been done regarding this bill on that day. Their rule 43 (printed House Rules) requiring that "one day's notice, at least, shall be given of the intended motion for leave to bring in a bill, unless *two-thirds* of the House allow otherwise, on motion to that effect." And rule 44 provided that "all bills before the House shall be taken up and acted on in the order in which they are numbered, and it shall be the duty of the chief clerk to number every bill in its regular order upon its first reading."

Here were two obstacles, in the House rules, to Mr. Morey's making any further progress with his tax bill on that fifth August, 1868. But one of the provisions of those rules (Rule 62) was, that any of them could be "*suspended*" by a vote of "*TWO-THIRDS of the members present*." The CONSTITUTIONAL provision, requiring three several readings "on three several days," formed no part of the eighty-two House Rules, not even being alluded to in any one of them. It sprung not from the members of the General Assembly, but from their masters. It towered immeasurably above them, and was unchangeable by them. It could not be dispensed with but by "*four-fifths of the House* where the bill was pending." Their own little rules they could amend, modify, suspend or abolish at their own sweet will, because they made them, and what they made they could destroy. But here was an over-mastering presence which could not be escaped by any subterfuge. It was not one of "the rules of the House" to be dashed aside by a simple vote of *two-thirds* of those present, but a *mandate of the Constitution* that created the House, stern, unbending and supreme, which could only be "dispensed with" by a special action or proceeding respecting itself alone, a proceeding to which "*four-fifths of the house* where the bill was pending," instead of "*two-thirds of the members present*," must give their concurrence.

This indispensable proceeding was never had; this concurrence was never given.

The inference that it was, can only be reached by bad grammar and

worse logic, by presumptions without evidence, and by arguments that must assume, what the court is forbidden to assume, that the houses composing the General Assembly are incompetent, by lack of intelligence, to do what the Constitution commands them to do, "keep a journal of their proceedings."

Let us now examine the entry upon which alone the Attorney General, and the counsel associated with him by the Government, rely. It is to be found on page 101 of the printed House Journal, in the entries for the same fifth August, 1868, the very day of the first "notice" of the bill:

"Mr. Morey, of Ouachita, under a suspension of the rules, offered the following bills, which passed their first and second readings, 150 copies of each ordered to be printed, and bills referred to the Committee on Ways and Means, as follows:

"House bill No. 10, an act to provide means necessary for the relief of the treasury of the State.

"House bill No. 11, an act levying a special tax to provide for the payment of the past due interest on the bonds of the State, outstanding warrants, certificates of indebtedness, and convention warrants."

According to grammatical construction, every school boy who has gone through the smallest treatise upon syntax can perceive that all that was done here, "under a suspension of the rules," was the introduction or "offering" of the bill. The collocation of the words, the punctuation, and the laws of composition in English, that noble language in which the legislative proceedings of the State are required by the Constitution, art. 109, to be promulgated and preserved, all point to this as an unavoidable conclusion. The inference is irresistible that the bills passed their first and second readings, were ordered to be printed, and were referred to the Committee on Ways and Means, without the suspension of any rules whatever, as to those distinct and subsequent "proceedings."

This view alone would seem decisive of the case.

But there is yet another. There were no "rules of the House" requiring suspension to pass the first and second readings, to order to print, or to refer to the Committee on Ways and Means. There were two rules of the House, one requiring the notice of at least one day previous to introduce a bill, and the other requiring the numbering it, and taking it up in its order, which needed suspension by two-thirds of those present before Mr. Morey could move a step in getting any action of the House on that day. This suspension, and this suspension alone, he seems to have sought and procured.

But "suspension of the rules" to offer a bill, of course meant nothing but suspension of "rules of the House." The Constitution is too elevated an instrument to be degraded to the level of and classed among "the rules of the House," or "the rules" simply. The basis of voting to *dispense with* the article 42 of the Constitution is a different basis of voting from that required to *suspend* "the rules," one demanding *four-fifths of the House*, and the other *two-thirds of the members present*. This *suspension of the rules*, and this *dispensation from a constitutional provision* cannot be lumped together, or tested by a single motion and vote. Each regulation stands upon its own distinct and separate footing, different in source, different in rank, different in sanction, different in manner of suspension, and different in result when not complied with. And so we find them treated even in this very Journal. At page 8, in the third day's proceedings, "Mr. McMillen, of Carroll, moved that the rule laid down in the 42d article of the Constitution, in regard to the consideration of bills and joint resolutions be dispensed with," in order to put a resolution on its passage. It is true, this was before the House Rules were adopted. But long afterwards, and after these proceedings upon Mr. Morey's tax bill, to wit, on the nineteenth of August, 1868—

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the same Mr. Morey appears to have recognized the immense difference between "the rules" and *constitutional provisions*. For, we find him, on page 144 of the House Journal, thus figuring:

"Mr. Carr, of Orleans, moved that Senate bill No. 70 be taken up.

"Carried.

"On motion of Mr. Carr, of Orleans, the reading of the bill in detail was dispensed with.

"The bill was passed on its first reading.

"Mr. Morey of Ouachita, moved to suspend the CONSTITUTIONAL rules to place the bill on its second reading.

"Rules not suspended."

That "the rules" simply meant *the House rules* is illustrated also by the following entry, to be found at page 97 of the House Journal, upon the same fifth August, 1868:

"Mr. McVean, of Caddo, moved to suspend *the rules* in order to amend rule No. 34.

"Carried.

"And then offered the following resolution, which was adopted: Resolved, That rule 34, item 4, shall read seven members instead of five."

The constitution has nothing to do with this. "Each house of the General Assembly may determine the rules of its proceedings." Constitution, art. 35. But there was one solitary *House rule* in the way of Mr. Carr, the Rule 62, which provided that "no standing rule or order of the House shall be *rescinded* or *changed* without one day's notice being given of the motion thereof. Nor shall any rule be *suspended* except by a vote of two-thirds of the members present."

It is, therefore, so clear upon the record that the article 42 of the constitution was not dispensed with by any proceeding at all in the House, that it becomes unnecessary to refer to other irregularities in detail. Were it important, we might discuss the question whether the four-fifths required to dispense with article 42 means four-fifths of the *members* (who were hardly ever present during the session) or four-fifths of the *quorum* accidentally present at the moment; we might dwell upon the unaccountable change in the number of the bill from 11 to 111; we might expose the singular proceedings of the Senate, as they appear in the printed Senate Journal (page 164), full of eccentricities that are quite surprising in the action of so grave a body upon so grave a project. But, having already established our first point out of the journal of the *House*, we must hasten to another branch of the case.

This tax law directly contravenes article 110 of the Constitution of 1863, which declares that "no retroactive law shall be passed."

It was held by the Supreme Court of the United States, in the case of *Rhode Island v. Massachusetts*, 12 Peters 657, that, "in the construction of *the Constitution* we must look to the history of the times, and examine the state of things existing when it was framed and adopted, to ascertain the old law, the mischief and the remedy."

The Constitution of the United States (art. 1, sec. 10,) only prohibited a State from passing "any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

Here was no express prohibition of laws divesting vested rights, or of retrospective laws in general, *ex post facto* laws having a settled technical meaning restricting them to such as related to crimes and penalties only. And so the courts of the United States held that they had no power, under the Constitution of the United States, to declare a State law void simply because it divested vested rights, or because it was retrospective in its character. The leading case upon this subject is that of *Satterlee v. Matthewson*, 2 Peters 380. On page 413, the Supreme Court of the United States remarked: "If the effect of the statute in question be not to impair the obligation of either of those contracts, is there any other part of the Constitution of the United

States to which it is repugnant? *It is said to be retrospective.* Be it so; but retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument. * * *

There is nothing in the Constitution of the United States which forbids the Legislature of a State to exercise judicial functions. * * *

The objection, however, which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of the act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description."

This case was followed in *Watson v. Mercer*, 8 Peters 110, where *ex post facto* laws were held to relate "only to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively."

Again, in the great case of the *Charles River Bridge v. the Warren Bridge*, 11 Peters 539, it was said: "It is well settled by the decisions of this court, that a State law may be *retrospective in its character*, and may divest vested rights, and yet not violate the Constitution of the United States, unless it impairs the obligation of a contract." In this case the terms "retrospective" and "retroactive" were used interchangeably as synonymous. See also, to a similar effect, *Bennett v. Boggs*, 1 Baldwin 74; *Balt. & Susq. R. R. Co. v. Nesbit*, 10 Howard 401; *Carpenter v. Penn*, 17 Howard 456.

The Circuit Courts of the United States, sitting in different States, conform to the State constitutions in regard to this matter, holding retroactive laws to be valid in States where they are not constitutionally prohibited, and void where they are so prohibited.

Thus, in the *Society for the Propagation of the Gospel v. Wheeler*, 2 Gallison 139, Story J. held that a law of New Hampshire, relative to the recovery for their improvements by evicted tenants of real estate, was unconstitutional, null and void, because a clause in the bill of rights of the constitution of New Hampshire denounced certain retrospective laws, among which the Judge thought this law to be included.

But in *Allen v. Bundy and May*, 2 Paine's C. C. Rep. 76, the United States Circuit Court (Thompson, J.) enforced a statute of Vermont, precisely similar to that of New Hampshire, under similar circumstances, holding it to be valid because the constitution of Vermont, like that of the United States, was silent upon the subject of retrospective laws.

The language of the bill of rights in the New Hampshire constitution was this: "Article XXIII. Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made either for the decision of civil causes or the punishment of offenses." Under this provision, the Superior Court of Judicature of New Hampshire held, very properly, that "in order to bring a law within the constitutional prohibition it must be a law *for the decision of a civil cause*, or for the *punishment* of an offense. All retrospective laws are not within the prohibition, notwithstanding the general terms of the *first part* of the article. They may be made for the *mitigation* of punishment." *Clark v. Clark*, 10 N. H. 388, referring to the instructive case of *Woart v. Winnick*, 3 N. H. 476.

In the case of *Boston v. Cummins*, 16 Georgia 113, the Supreme Court of that State (Lumpkin, J.) said: "But neither by the civil law, which is the basis of the different codes, to a greater or less extent, of all continental communities, nor by the English law, from which our system was more directly borrowed, and which is itself much more indebted to the civil law than the jurists of that country have ever been willing to acknowledge, has the right to pass retrospective acts ever been doubted. And it is a matter of discretion pretty much for the Legisla-

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ture (under the restrictions of the fundamental compact) how far it may be expedient to enact laws of this description."

So in California, it was held by the Supreme Court of that State, in *Von Schmidt v. Huntington*, 1 California 65, that, "as a general rule of statutory interpretation, it is undoubtedly true that a statute should be construed to operate upon the future, and not upon the past; but, *with the exception of those cases which come within the purview of prohibitory clauses in State constitutions or in the Constitution of the United States*, we know of no case in which it is not competent for a State Legislature to give a statute a retroactive effect; and it is the very scope and object of the statute of twenty-eighth February to provide for the decision upon appeal of cases which had been tried previous to its passage." Because there was no clause in the constitution of California forbidding retroactive laws, that act was held valid.

In the constitution of Pennsylvania, also, there was no *express* prohibition against retroactive legislation. Yet, one of the ablest judges that ever sat in that State seems to have regretted that their courts had not taken a stand against it, as prohibited by implication. In *Greenough v. Greenough*, 11 Penn. State Rep. p. 495, Chief Justice Gibson said:

"All *ex post facto* laws are arbitrary; and it is to be regretted that the constitutional prohibition of them has been restricted to laws for *penalties and punishments*. In a moral or political aspect, an invasion of the right of property is as unjust as an invasion of the right of personal security. But retroactive legislation began, and has been continued, because the judiciary has thought itself too weak, because it has neither the patronage nor the *prestige* necessary to sustain it against the antagonism of the Legislature and the bar. Yet, had it taken its stand on the rampart of the Constitution *at the outset*, there is some little reason to think it might have held its ground."

Noble words, and full of warning as to the course proper to be pursued by the judiciary here, in this, the first case arising under a new constitutional provision in Louisiana!

On account of such experienced mischiefs, and of judicial lamentations like these over the absence of an express constitutional restraint upon retroactive legislation, some States in the Union previous to the change in Louisiana, had felt and acted upon the necessity of such a textual prohibition in their fundamental laws.

In Ohio, for instance, under the constitution of 1802, there was no such inhibition. And the Supreme Court of that State, in many cases, while recognizing the impropriety of such legislation in general, yet held that they had no power to supply the omission in their organic law, by construction. In 1851, a new constitution was there adopted, expressly prohibiting retrospective laws. While the Supreme Court of Ohio adhered to their old decisions as to laws passed under the old constitution, they expressed their satisfaction that all such legislation in future would be inoperative and void. In the *Trustees of Cuyahoga Falls v. McCaughey*, 2 Ohio (N. S.) 154, decided in 1853, they said: "We do not favor retrospective laws, *and think they were wisely prohibited by the new constitution*, but they were frequently sustained under the former constitution, and have also been sustained by the highest courts of other States and by the Supreme Court of the United States." And again, in *Archeson v. Miller*, 2 Ohio (N. S.) 207, they said: "But even if the statute had changed the law, we could not say that it came in conflict with the constitution *then in existence*. Retrospective laws of this kind have frequently been passed, and have been decided by our own as well as other courts to be valid, *in the absence of any specific constitutional prohibition*."

And in *Butler v. City of Toledo*, 5 Ohio (N. S.) 225, it was held that a retroactive assessment, to complete a deficiency for paving streets,

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having been levied under the Constitution of 1802, would stand, intimating that no such thing could take place under the new Constitution, which forbade retroactive laws.

Following the lead of the Supreme Court of the United States, which finding no clause in the United States Constitution inhibiting the States from passing retroactive laws *eo nomine*, decided therefore that the court could not supply such a prohibition by implication; the several State tribunals, where their *State* Constitutions contained no such express prohibition, declined to supply it.

And it was precisely upon this ground that the case of Municipality No. 1 v. Wheeler and Blake, 10 Ann. 745, was decided. "However repugnant to logic and sound policy they may be, retrospective laws, in civil matters, do not violate the Constitution, unless they tend to divest vested rights or to impair the obligation of contracts, neither of which can be predicated of the act in question."

By referring to the Louisiana Constitution of 1852, then in existence, it will be found that there was no prohibition against retroactive legislation, any more than there is in the Constitution of the United States. This decision of Wheeler and Blake's case was followed in Cordeviolle's case, 13 Ann. 268; Poutz' case, 14 Ann. 853, and Locke's case, in 14 Ann. 854, which last case was correctly affirmed by the Supreme Court of the United States upon writ of error, as reported in 4 Wallace 172.

But the oft repeated regrets of judges over their inability to prevent the obvious injustice of retrospective legislation generally, combined with the mischiefs consequent upon such legislation, at last produced their effect here in Louisiana, as they had already done in Ohio and some other States.

Indeed, it is probable that this very decision of Wheeler & Blake's case, and those decisions which followed in its wake, impelled the framers of the Constitution of 1864 to revise article 105 of the Constitution of 1852 by simply inserting the two words "or retroactive" after the words *ex post facto*, making the article 109 of the Constitution of 1864 to read thus: "No *ex post facto* or retroactive law, nor any law impairing the obligation of contracts, shall be passed, nor vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made." This article is preserved *totidem verbis* in article 110 of the present Constitution of 1868, and this is the first case in which this important and controlling innovation upon the old Constitutions of 1812, 1845, and 1852 has been brought forward as the basis of judicial action. The change was obviously made to prevent the possibility of any more such decisions as the court was compelled to make in Wheeler & Blake's case. If this provision had existed in the Constitution of 1852, that case would certainly have been decided the other way by that bench unanimously. As it was, even without any constitutional prohibition, such is the odium of this species of legislation, that the court hesitated long over the case, and one of the judges (Mr. Justice Buchanan) dissented at last in a very earnest opinion.

That case was a most peculiar one in its features, and it was not tainted with the reproach of injustice that this is, as the court will perceive by reading the whole of the majority opinion.

All but that portion which held that retroactive legislation was not forbidden by the Constitution, was *obiter* simply, not even binding on the court that uttered it. Those remarks vindicating the law "from the odium of injustice" were occasioned by the dissent in the court, were not material to the judgment, and are not to be taken as essential doctrine of the case. The law passed upon there was "not strictly retrospective," because it was remedial merely; the tax then in question had been prospectively laid and almost all of it collected and expended, so that the effect of disturbing it would lead to great inequality and injustice.

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The short opinion of Mr. Justice Field, in *Locke v. New Orleans*, 4 Wallace, 172, was evidently based upon the majority opinion in *Wheeler & Blake's case*, 10 Annual, although the latter case is not alluded to. An *obiter* expression is quoted from it almost verbatim, but so separated from the explanatory remarks which followed as to convey an erroneous opinion of its meaning. The question whether the law was retrospective or not was not before the Supreme Court of the United States at all, as the only point that court could review by writ of error to a State court was, whether the Constitution of the United States was infringed, and it was correctly held that it was not, because that instrument did not forbid retroactive laws at all.

If the Legislature can tax upon an assessment made the year previous and with a view to the taxes of that year, it can do so upon an assessment of two years previous; upon one of three years; upon one of four years; upon one of ten years ago; that is, upon an *ante bellum* assessment, including slaves! Who shall draw the line? The Constitution draws it clearly and unmistakably. You shall not retroact at all. Your legislation levying taxes and providing assessments according to which taxes shall be distributed, like all other legislation, shall be *prospective* only. You shall so act in imposing *future* taxes, which alone you have power to impose, as to provide a just measure of the value of every tax-payer's property for the year in which that tax is to be laid. If you depart from this plain rule, all must be left to the wild caprice, and greed, and passion, and savagery of party domination, and the boasted Constitution is indeed "a parchment lie."

By virtue of the change in our State Constitution expressly inhibiting, for the future, *all retroactive laws*, the doctrine announced as the true one, on principle, in *Michoud's case*, 6 Ann. 610, has become a constitutional and imperative doctrine, which cannot now be violated by the Legislature without affecting their acts with absolute nullity. "The power to lay and collect taxes has ever been understood to operate prospectively; and never retrospectively, as contended. If the council could legally tax for a year back, we see no reason to prevent them from doing so for any numbers of year. Such has never been the interpretation of a power to lay and collect taxes either by the Legislature or political corporations acting under its authority."

The law in question comes precisely within the definition of Worcester: RETROACTIVE, "Acting backward, or upon something past or preceding."

The last question presented by our injunction is, whether the Act No. 114 (Sess. Acts 1868) does not infringe that clause of the Constitution in article 118, which declares: "Taxation shall be equal and uniform throughout the State; all property shall be taxed in proportion to its value, to be ascertained as directed by law."

Our remarks under this head will further illustrate and strengthen our previous position, that the tax law in question is retroactive in its character; and the interdict against retroactive laws in the new Constitution also powerfully reinforces this our third position.

Property is essentially inconstant in value. It fluctuates from year to year. Some descriptions of property are rising in value, while others are falling. Notably has this been the case during the past few years, marked as they have been by the most sudden and extraordinary convulsions, civil and political. Sugar plantations this year are often appraised at more than twice the valuation of 1867, while cotton lands in many parts of the State, have scarcely risen at all. Some persons have made fortunes in the last year, while others have lost them.

Not only does property fluctuate in value, but it is constantly passing from hand to hand. No man's estate is in precisely the same condition as to its elements and valuation in 1868 that it was in 1867. And these changes of ownership and estimation are so great, from last year to this as

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to make it impossible for a tax levied on the twenty-ninth day of September of the year 1868, to operate equally, uniformly and in proportion to value throughout the State, by levying it at a rate of one per cent. upon an assessment made in the spring and summer of the year 1867. In the first place, each tax payer was assessed in the year 1867 only upon the property he then owned. Many persons then owning property parted with it entirely before the assessment for 1868 was begun or this tax thought of. Many who owned no property when the assessment of 1867 was made, have acquired large estates since then, and before the new tax was levied. Large numbers of speculators have been buying up property in this State since the assessment of 1867. These last will escape any taxation at all under the retroactive law in question, while those who have lost all or part of the property assessed as theirs in 1867 will have to pay now a tax of 1868 upon property they ceased to own before the dawn of the year 1868, and long before the tax was imposed. Numerous individuals who were assessed in 1867 on lands and houses then standing in their names, but encumbered with mortgages and other liabilities, were obliged to suffer those lands and houses to be sold before the tax of the twenty-ninth September, 1868, was ever dreamed of; and yet, if the law be valid, they must be held bound to pay this new tax, while those who acquired the same estates, perhaps at forced sales, even before the year 1863, will escape scot free! Is this the equality and uniformity demanded by the Constitution? Is this prospective, and not retroactive legislation, which produces such results? Or is it not rather the most unequal, retrospective, odious and unconstitutional system of taxation that the wit of man could invent?

It may be said that these changes in ownership and valuation are going on all the time, and so that no assessment whatever will be altogether fair, even if made after the tax be levied. To a certain extent, the remark is just. *Absolute* equality and uniformity are unattainable, and Judges do not sit to enforce Utopian or impracticable theories.

But it is the duty of Judges to compel the Legislature to conform, as closely as is practicable, to the positive injunctions of that Constitution which is the measure of its authority and the sole source of its power.

And it is practicable, and most reasonable and proper besides, that an assessment of property should follow the act levying the tax, or at least *immediately* precede its attempted collection. It is feasible, just and positively necessary, that the tax and the assessment, which is the basis of the tax, should be contemporaneous, that is, *in the same year*. The taxes of 1867 and the assessment of 1867 should go together; the taxes of 1868 and the assessment of 1868 cannot be constitutionally divorced. It is not true that when this special one per cent. tax of September 29, 1868, was ready for collection, the assessment of 1867 was the "last assessment." The assessment of 1868 had been made and completed, if the assessors did their legal duty, before a single demand was made of any tax payer for this extraordinary tax. If it had not been quite completed when the law was approved, it was equally the duty of the Legislature levying a tax in September, 1868, to levy it according to that assessment of 1868 (which had begun in the spring, continued through the summer, and was then nearly, if not quite completed), so soon as it should be completed, or it was their duty to order a new assessment with direct reference to this "special tax." They had no more constitutional power to refer the basis of this tax back to the assessment of 1867 than they had to that of 1860.

If we once depart from the simple and obvious rule that taxes and assessment should be contemporaneous, or that the assessment should follow the levy and precede the collection of each tax, where shall we stop? What is the gauge by which the court can determine that an act levying a tax upon an assessment roll over a year is valid, while one levying it on an assessment roll ten years old is invalid? Each year

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must bear its own burdens, and not those of others. The assessment of 1867 was made for the taxes of 1867 alone, and has nothing to do with those of 1868. The taxes of the year 1867 cannot be levied in the year 1868. The assessment of 1867 cannot form any just criterion for making a tax laid late in 1868 equal and uniform, and proportionate to the value of all taxable property throughout the State. As a more just criterion could obviously be had in the assessment of 1868, or even a special new assessment, the court will not hesitate to condemn such a violation of constitutional requirements in the exercise of the taxing power.

These views are fortified by the concluding phrase of the second clause in the article under discussion: "*All property shall be taxed in proportion to its value, to be ascertained as directed by law.*" Here is no provision for taxing property according to a value that it may have had at some bygone time; but a direction that it *shall be* taxed according to its *value*, which would naturally mean according to its value *at the date of the levy of the tax*, or at the very least, according to its value *in that year*; and this view is confirmed by the expressions, "*to be ascertained,*" implying a *future* assessment, and "*as directed by law,*" not by a retro-active law, for the same Constitution expressly forbids such a law, but by a law that shall be prospective in its operation, or at least based upon contemporaneous proceedings.

For these reasons, we submit that it is not now competent for the law-makers of Louisiana to tax backwards, or to assess backwards. The supreme law forbids it, and forbids this special tax act as it now stands, in terms too plain to be mistaken, evaded, or disobeyed.

ARGUMENT FOR THE STATE.

This case involves the constitutionality of the act of the Legislature of Louisiana, approved twenty-ninth of September, 1868, entitled "An act levying a special tax to provide for the payment of the past due interest on the bonds of the State, outstanding warrants, certificates of indebtedness and Convention warrants." Plaintiff, who is a tax payer, obtained an injunction against the defendant, a State tax collector, restraining him from collecting the amount levied upon plaintiff by the statute aforesaid. The injunction was made perpetual by the court below, upon the ground that the law in question is unconstitutional. From this judgment the State of Louisiana—the real defendant—has appealed. This cause involves the decision of a number of other cases still pending in the courts below.

The case at bar suggests the consideration of two general principles of constitutional law:

First—What limit is there to the power of the Legislature to levy and collect taxes?

Second—How far will this tribunal go in declaring a law enacted and duly promulgated, to be unconstitutional and void?

The power of taxation is inherent in all governments. It has no limit but in the will of the sovereign power. In an unlimited monarchy the king may tax, may even confiscate. In a republic, where the people are sovereign, they vest in their governmental agents that inherent sovereign power of taxation, limited only by their expressed and unquestionable will, which can be found nowhere but in the constitution of the State. "The power of taxing the people and their property," says Chief Justice Marshall, "is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it. The only security against the abuse

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is found in the structure of the government itself. In imposing a tax the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation."

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives to guard them against its abuse." *McCulloch v. the State of Maryland*, 4 Wheaton, p. 428. A late writer upon constitutional limitations, says, "The authority to impose taxes is one so unlimited in form and so searching in extent, that the courts scarcely venture to declare that it is subject to any restriction whatever, except such as rests in the discretion of the authority that exercises it. It reaches to every trade and occupation; to every object of industry, use and enjoyment; to every species of possession; and it imposes a burden which, in case of failure to discharge it, may be followed by seizure and sale or confiscation of property. No attribute of sovereignty is more prevailing and at no point does the power of the government affect more constantly and intimately all the relations of life than through this power." *Cooley's Constitutional Limitations*, page 479.

"Taxes are defined to be burdens or charges imposed by the legislative power of a State upon persons or property to raise money for public purposes." *Blackwell's Tax Titles*, 1864, p. 1.

Alexander Hamilton says:

"The conclusion is that there must be interwoven in the frame of the government a general power of taxation in one shape or another.

"Money is, with propriety, considered the vital principle of the body politic, as that which sustains its life and motion, and enables it to perform its most essential function.

"A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution.

- "From a deficiency in this particular, one of two evils must ensue: either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time, perish." *The Federalist*, No. 30, p. 142, original edition.

And again, the same enlightened statesman says:

"It conducts us to this palpable truth, that a power to lay and collect taxes, must be a power to pass all laws *necessary* and *proper* to call it into effect." *The Federalist*, No. 33.

In the year 1868, the government of our State was in dire need of funds. Previous Legislatures had refused to enforce the collection of back taxes, but had not scruples to contract a vast floating debt to leave as a legacy to the present government. There was no money to pay the current expenses, and the bonds of the State were gradually becoming as worthless as the Continental currency after the Revolution, for want of payment of their coupons. The Legislature acted promptly, yet with no undue haste. The law whose constitutionality is now questioned was passed—an act demanded by the exigencies of the moment, and framed with regard to the best interests of the State. This court is now asked to annul this law for some fancied violation of the constitution.

We are told that Legislatures are "creations of the Constitution; they owe their existence to the Constitution; they derive their power from the Constitution;" that "if a legislative act oppugns a constitutional principle the former must give way and be rejected on score of repugnance," and that "in such case it will be the duty of the court to

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adhere to the Constitution and to declare the act null and void." Plaintiff's brief, pp. 3 and 4. These axioms are unquestioned.

But "the Constitution should be liberally construed in upholding the constitutionality of statutes." *The People v. Board of Supervisors of Orange*, 27 Barbour N. Y., p. 575.

"The sovereign law-making power of the State is entitled to at least as strong a presumption in favor of the validity of its acts as a criminal on trial in favor of his innocence." *Ib.* See *Cochran v. Van Surley*, 20 Wendell 365; *People v. Fisher*, 24 Wendell 215.

"If an act of Congress admits of two interpretations, one of which brings it within, and the other presses it beyond, their constitutional authority, the judiciary will adopt the former construction, because a presumption ought never to be indulged that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous." *United States v. Combs*, 12 Peters 72.

This same principle applies to the legislation of the several States.

"The Supreme Court," it has been held by this court, "as the guardian of the constitutional rights of the people, is authorized to pronounce on the constitutionality of the acts of the two other departments of government; but no act of either will be pronounced unconstitutional unless manifestly so, and the incompatibility with the constitution must be evident." 3 M. 12 and 553; 3 N. S. 472; 4 N. S. 138; 5 R. 333; 8 An. 341.

This court recently reaffirmed this doctrine in the case of the *State v. Volkman*.

From these authorities it clearly results that the power of the Legislature to lay and collect taxes is only limited by the Constitution, and that the court will always presume that the statute is not violative of constitutional provisions, and will refuse to annul a legislative act unless its conflict with the fundamental law is manifest beyond doubt.

It is maintained by the plaintiff in injunction that the act of September 29, 1868, is unconstitutional.

First.—Because it was not passed with the formalities prescribed by article 42 of the Constitution.

Second.—Because it is retroactive.

Third.—Because the tax is not equal and uniform.

In proceeding to consider the first objection to the Act No. 114, viz: that it was not passed with the forms and solemnities required by the Constitution of Louisiana of 1868, we are met at the threshold with the important question as to whether this Court will feel itself authorized to go back of an enrolled and duly authenticated and promulgated statute, to examine the journals of the Legislature in order to ascertain if the law was properly passed. The decisions throughout the Union establish the doctrine that courts cannot take judicial notice of the journals of the Legislature in order to impeach a statute upon grounds of informality in its passage.

By the common law, the acts of Parliament import absolute verity. Comyn Dig. Title Parliament. There is no common law in this country conflicting with this principle, nor does the Federal Constitution in any way change the rule of the common law. Laws of Congress require no proof, and they are considered of such authority that no evidence is allowed to contradict them. All statutes of Louisiana are signed by the Speaker of the House of Representatives, and by the President of the Senate, and by the Governor, unless vetoed. They are then required to be kept by the Secretary of State. Articles 66 and 68, Constitution 1868. When an act has been passed, thus signed, deposited and recorded, it has absolute authenticity and validity. But it is said by plaintiff's counsel—Brief, p. 9.—that the Constitution requires that "each house shall keep and publish weekly a journal of its proceedings;" and they suggest that these are intended to remain as proof of

the proper or improper enactment of a statute. But the journals are nowhere made evidence for any purpose. The object of requiring the houses to keep a journal, is stated by Judge Story to be, "To ensure publicity to the proceedings of the Legislature, and a corresponding responsibility of the members to their respective constituents." 2 Story Comm. on Const., § 838. And not to furnish evidence by which the passage of the acts of the Legislature may be called into question, and the acts themselves nullified.

This question was reviewed and decided by the Supreme Court of Mississippi in 1856, in the case of *Green v. Weller et al.* 32 Mississippi Rep. p. 650. The court said: "The record of a public act of the Legislature of this State is the enrolled bill, clothed with the solemnities required by the Constitution, and filed in the office of the Secretary of State. The signatures of the presiding officers of the two houses, and of the Governor, is required in attestation, that the bill was passed in due form. This implies the power to determine whether the act has been passed in conformity to the requisites of the Constitution, and a memorial of it is required to be made in order that it may stand as a record of the authenticity and validity of the act. No other record of the act is required to be kept, and of necessity it must have been intended that the act so sanctioned and required to be preserved, shall constitute a record, with the incidents appertaining to such a record at common law, importing absolute verity, which no evidence is allowed to contradict, and a compliance with the forms necessary to its validity, It stands upon the same footing as the record of a court of justice. and every matter adjudicated becomes a part of the record which thenceforth proves itself without referring to the evidence on which it has been adjudged. * * * And the facts implied by such a record could no more be contradicted, than could it be shown that a judgment of this court, which appeared by the record to be rendered by the whole court, was, in truth, rendered by but one member of the court, or that a formal judgment of an inferior court was rendered without evidence." 32 Miss. Rep. p. 650.

In the case of the *Pacific Railroad v. the Governor*, 23 Missouri Reports, p. 353, the Supreme Court of that State decided that the validity of an enrolled statute, duly authenticated, could not be impeached by the journals showing a departure from the forms prescribed by the Constitution. The organ of the court in that case—a case in which this question was ably and fully discussed and reviewed—used the following remarkable language: "When we reflect on the manner in which the journals are made up, and the rank of the officers to which that duty is entrusted, how startling must the proposition be that all our statute laws depend for their validity on the journals of the two houses of the General Assembly, showing that all the forms required by the Constitution to be observed in the enactment have been complied with. The required forms may be observed and the clerks may fail to make the necessary or correct entry. If the journals had been designed as the evidence in the last resort, that the laws were constitutionally passed, would not some method have been adopted by which greater care would have been exacted in entering the proceedings of the two houses? Would the task of making them have been entrusted to a single clerk, with the power in the houses to dispense with their reading even should there be a rule requiring them to be read—a matter, however, about which the Constitution and laws are silent?" 23 Mo. 353.

A clause in the Constitution of New York requires the assent of two-thirds of the members elected to each branch of the Legislature to pass a certain class of laws. A statute of the State provides that no such law shall be deemed to have so passed unless it affirmatively appear to have been so passed upon the enrolled bill by certificate of the presid-

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ing officers; thus clearly showing that the journals were not of sufficient authority to establish such an important fact. It was under this provision that the case of the People v Purdy, 2 Hill 31, relied on by the counsel for plaintiffs—and other cases, arose in the State. It was held that the court might inspect the *the enrolled bill* in the office of the Secretary of State. The Supreme Court of Missouri, in the case already cited, carefully reviewed these cases, and held that they had no bearing upon the issue now made. They stated: "In our investigation we have not met with a single case in which the courts have looked behind the statute roll in order to determine whether in passing a law, the members of the Legislature conformed their conduct to the rules directed by the Constitution to be observed in framing laws." *Pacific Railroad Company v. Governor*, 23 Mo. 353.

But the case of *The People v. Devlin*, decided in 1865 by the Court of Appeals of the State of New York, 6 Tiffany 33 N. Y. Rep. p. 269, completely overthrows the authority of the Purdy case, if it ever had any application to the question now before this court, and finally puts at rest this disputed question. "I am of opinion," says the court, "that the legislative journals were not legitimate evidence to impeach the statute produced. They are not made evidence by the Constitution; they are not made so by the statute; they were never made so at common law."

But if the court should deem itself authorized to look further than the law itself to ascertain whether the provisions of article 42 of the Constitution were complied with in the passage of the law No. 114, then it will be found that the journals of the House disclose no informality in its enactment, but show affirmatively that the requirements of the constitution were observed.

It will not be denied that this article 42 is intended, and only intended to guard against hasty legislation. Let us trace this law in its passage through the two houses, and it will be seen that it was enacted in accordance with the spirit of that constitutional safeguard, and only after the most ample consideration and free discussion.

On the thirty-fourth day of the session, August 5, Mr. Morey, of Ouachita, offered in the house two bills, under a suspension of *the rules*, which passed their first and second readings, 150 copies ordered to be printed, and both were referred to the Committee on Ways and Means. The first of these was House bill 110—erroneously printed House bill No. 10—"An Act to provide means necessary to the relief of the State." The second was House bill 111—erroneously printed No. 11—"An Act levying a special tax to provide for the payment of the past due interest on the bonds of the State, outstanding warrants, certificates of indebtedness, and Convention warrants." See House journal, p. 101.

On the forty-third day of the session, August 17, the Committee on Ways and Means reported on House bill No. 111, and recommended that House bill No. 106 be adopted as a substitute. The House then agreed to consider the bill in Committee of the Whole. House journal, p. 130.

On the forty-fourth day, August 18, the House considered the bill 111 in connection with five other proposed finance bills. "After a lengthy debate," the committee rose, reported progress, and asked leave to sit again. House journal, p. 136.

On the forty-eighth day of the session, August 23, the Committee of the Whole again considered the bill in same connection, rose and reported progress. House journal, p. 158.

On the fifty-third day, August 28, the bill was once more considered in Committee of the Whole, when, in the language of the journal, "After a protracted and lengthy discussion, the committee rose," and reported progress. House journal, p. 174.

On the fifty-fourth day, August 29, the Committee of the Whole again "discussed the merits of the bill, rose, and through its chairman

recommended its passage." An attempt was then made to suspend the rules, which failed. Journal, p. 178.

On the fifty-sixth day, September 1, the bill passed its third reading. House journal, p. 184.

It will be thus seen that in the House the bill was pending for twenty-two days, and was discussed, in Committee of the Whole, upon four different days.

The bill reached the Senate on the fifty-sixth day of the session of the Senate, September 2. Senate journal, p. 148.

On the fifty-seventh day—September 3—the bill came up on its first reading, and under a suspension of the rules passed its second reading and referred to the Committee on Finance. Senate journal, p. 149.

On the fifty-ninth day—September 5—the committee reported favorably. Senate journal, page 154.

On the sixty-second day—September 9—the rules were suspended and the bill taken up out of its order, section by section, and finally adopted under a suspension of the rules. Senate journal, pages 164 and 165.

On the sixty-fourth day of the House session—September 10—the bill was returned from the Senate with an amendment. House journal, p. 209.

On the sixty-seventh day, September 15, the bill came up on the consideration of the amendment, and action postponed until Wednesday. This was Monday. House journal, p. 215.

On the sixty-ninth day, September 17, the bill was taken up with the amendment; the House refused to concur, and a notice was ordered to be sent to the Senate. House journal, p. 221.

On the sixty-ninth day of the Senate session, September 17, the Senate was notified of the refusal of the House to concur. Senate journal, p. 181.

On the same day the Senate receded from its amendment, and the bill became a law subject to the approval of the Governor, which was obtained on the twenty-ninth day of September, just fifty-four days after its introduction in the House.

It was contended in the court below that the constitutional rule required a bill to be read three several days, unless four-fifths of the house in which the bill is pending, suspend the rule, and that this provision contemplated the action of *four-fifths of all the members elected*. It is presumed that this interpretation will not be seriously insisted upon in this court. The same article No. 42, reads: "No bill shall have the force of law until on three several days, it be read in each house of the General Assembly." Certainly a house qualified to hear the bill read is a quorum. It is impossible reasonably to give the word two different significations in the same clause. The Senate of the United States, seventh July, 1856, decided that two-thirds of a quorum only were requisite to pass a bill over the President's veto, and not two-thirds of the whole Senate. 9 Law Reports quoted by Paschal, p. 93; see Cushing's Law of Legislative Assemblies, § 2387; Story on the Constitution, § 891; 1 Kent 249, note 6. The question came up in the Senate of Louisiana in 1846, as to what was meant by two-thirds of the Senate. It was decided without division to mean two-thirds of the members present. See journal of 1846-47, p. 40. The rules adopted by that body have remained with few changes until this day. The present rules specifically declare that four-fifths of the members present may direct the passage of a bill through more than one reading the same day. Senate Rule 33, 1868. It has been the interpretation of the House of Representatives of the Legislature of Louisiana. See House journal 1850, pp. 155 and 166.

But this question is not without judicial authority. In the case of *Green v. Weller*, 32 Miss., before cited, the point was clearly presented

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and decided. The act in question in that case was a statute proposing an amendment to the constitution of the State. It was held that when the constitution provided that such a bill should be passed by two-thirds of each house, the bill could be passed by two-thirds of a duly constituted quorum. 32 Miss. p. 682.

But it is contended that the entry on page 101 of the House journal, which states that "Mr. Morey, of Ouachita, under a suspension of the rules, offered the following bills, which passed their first and second readings, 150 copies of each ordered to be printed, and bills referred to the Committee on Ways and Means" does not, "according to grammatical construction," show that the Constitutional rule was dispensed with.

It is not urged by the counsel for the plaintiffs that there was any other informality than that alleged to have occurred on the day when the bill was introduced by Mr. Morey, as just stated.

Notwithstanding the hypercritical comments of the counsel on the other side upon the grammatical construction, punctuation and composition of this clause of the journal, it is clear from the whole paragraph, and the correlation of its members, that the House intended to suspend all the rules that it was necessary to suspend, in order to do what it did, i. e., get the bill before the House and pass it through its first and second readings. The counsel contend that the only thing that was done here under a suspension of the rules, was the introduction or offering of the bill.

In order to offer a bill, it was necessary to suspend *only one* rule—rule 43, of the House, which says: "One day's notice at least shall be given of an intended motion to bring in a bill, unless two-thirds of the House allow otherwise on motion to that effect." It was not necessary to suspend the forty-fourth rule of the House, which says: "All bills *before the House* shall be taken up and acted on in the order in which they are numbered; and it shall be the duty of the chief clerk to number every bill in its regular order *upon its first reading*." Now, a bill cannot be *before the House* until after it is offered; and it cannot be numbered until it is before the House, for the clerk is not to number it, until it is put upon its first reading. The journal says that Mr. Morey moved "a suspension of the *rules*," not *rule*, in the singular (as it would have been had he desired *merely to offer* the bill) but *rules*, in the plural. The suspension of these rules was had in order that the bill might be passed through the first and second readings and be referred.

To do this, it was necessary to suspend not only House rule 43 by a two-thirds vote, but also to suspend the constitutional rule, article 42, by a fourth-fifths vote. As the record does not show that there was any opposition to the suspension of the rules, it is but fair to presume that the vote was unanimous; at all events no evidence *aliunde* has been offered to show that there was less than a four-fifths vote.

The clerk of this House, it seems by glancing through the journal, had a formula for recording the thing done at this time, viz: the presentation of a bill without previous notice, and the passage of it to a second reading in order to get it before a committee to be considered and reported upon. Thus, on page 25, we read, "under a suspension of the rules, the following bill, offered by Mr. Carr, of Orleans, went through its first and second readings and was referred to the Committee on Education;" and so on pages 52, 53, 108, 144, and 148 we find like entries. Now, to say that these bills did not pass their first and second readings, is to strike with nullity nearly every measure adopted by the Legislature, and charge the House with trifling. These minutes were approved, and the bills so introduced and passed to their third reading were subsequently acted upon accordingly. A plea of bad grammar will hardly vitiate laws so enacted. We must conclude that that was

done which was evidently to be done, and which a fair interpretation of the minutes disclose was done.

The objection that the act No. 114 is retrospective is unfounded. It does not partake of the characteristics of a retrospective statute in the constitutional sense in which the word is used, nor even is it retroactive in the ordinary meaning of the term.

The counsel for plaintiffs, in their brief, have cited an incontrovertible array of authorities to establish the doctrine that, when there is no constitutional inhibition, the Legislature may pass retrospective laws; but that they cannot do so if prohibited by the Constitution. They have not, however, referred to the decision of a single court, nor to the language of even one elementary writer to sustain the allegation that a statute levying a tax based upon the last and only extant assessment roll of the State is open to the objection of being retrospective. We have nothing to do with the wisdom of prohibiting the passage of retrospective laws; they are unconstitutional, null and void, and our only inquiry is to know whether the statute in question is such a law.

All laws that "look backwards" or "act backwards" are not retrospective within the meaning of the Constitution. Such an interpretation would annul every statute relating to a condition of facts existing prior to its passage. A retrospective law is something more. "Laws are deemed retrospective, and within the constitutional prohibition, which by retrospective operation, destroy or impair vested rights, or rights to do certain actions, or possess certain things, according to the laws of the land." *De Cordova v. The City of Galveston*, 4 Texas, 479. Chancellor Kent, in the case of *Dash v. Van Kleeck*, 7 Johnson's Reports 477, in considering retrospective laws, speaks of them as laws impairing previously acquired civil rights. The Tennessee Constitution prohibits retrospective legislation. In the case of *Townsend v. Townsend and others*, reported in 1 Peck's Tenn. Reports, p. 1, the Supreme Court of that State says: "We have viewed with earnest attention the Bill of Rights, section 20, and have considered the inconveniences which any one interpretation will produce, and have finally settled down in this opinion, that the word retrospective, as in the North Carolina and Maryland Constitutions it is followed by *explanatory words*, so here it is explained by the words which immediately follow: "or law impairing the obligation of contracts," and that the whole clause, and both sentences taken together mean, that no retrospective law which impairs the obligation of contracts, nor any other law which impairs their obligation, shall be made, the latter words relating equally to both the preceding substances, and therefore that the term *retrospective* alone, without the explanatory words, can have no influence in this discussion." Peck's Tenn. Rep., p. 16.

We gather from these authorities, as well as from those cited in plaintiff's brief and the written opinion of the judge below, that the term *retrospective*, as used in article 110 of the Constitution, has a very restrained meaning.

A law may "retrospect" and "retroact" ever so much and it will not be unconstitutional unless it interferes with some civil right arising out of past transactions.

1 Kent Com. 455 and 456—note, authorities cited; 11 Peters, 539 and 540; 1 Peck's Tenn. Rep., 17; 2 Peters, 413; 8 Peters, 110; 7 Johnson, 455—*et seq.*, citing Puffendorff Droit de la Nat. L. 1 C. 6, sec. 6; also, 1 Bay. S. C. R., 170; 3 Dall., 386; 3 Story, Com. Const., 266; Eastman's Dig. Maine Reports, 161, and cases cited; *Wonet v. Winnick*, 3 N. H. 481; *Clark v. Clark*, 10 N. H. 386; 1 How. Miss. R. 183; 1 Engl. Ark. R. 491.

But it is abundantly established by an unbroken series of decisions, both in this State and in our sister States, that laws which impose

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taxes upon assessments, made prior to the passage of such laws, are in no sense retroactive.

In the case of the Police Jury of St. Mary v. Harris, "the action was based upon an ordinance of the police jury of the parish, passed in the month of October, 1852, by which a tax of three per cent. was levied on the landed estate, as expressed [assessed] in the tax roll of the year, 1851." One objection "to the payment of this tax in the answer and urged in argument," was, that "the assessment ought not to have been made upon the tax roll of 1851." It is thus disposed of by the court: "On the second point, viz: that the assessment was illegal because the tax roll of the year 1851 was taken as the basis of the same, it may be observed that there is nothing in the record to show that the assessment roll of the year 1852 had been completed. In the absence of any allegation and proof to the contrary, it is but fair to presume that the police jury took the last assessment roll as the one upon which to levy the tax." St. Mary v. Harris, 10 Ann. 677, 678.

In the case of Municipality No. 1 v. Wheeler & Blake, the defendants were sued for a tax on an assessed capital of \$20,000 for the year 1849, imposed by an ordinance of the municipality, approved nineteenth March, 1851. On the seventh of February, 1850, the Legislature passed a law empowering the municipalities of New Orleans to levy taxes on capital on the assessment rolls of 1848 and 1849. The defendants contended that the act of 1850, as well as the ordinance in pursuance thereof, was unconstitutional and void. The court said: "The statute is said to be unconstitutional, because it is retroactive in its operation. It is not an *ex post facto* law, as it has no relation to crimes and penalties. Article 8, of the Civil Code, which is the creature of the legislative power, cannot control the power that created it. However repugnant to logic and sound policy they may be, retrospective laws in civil matters do not violate the constitution, unless they tend to divest vested rights, or to impair the obligation of contracts. * * But the law under consideration does not seem to be obnoxious to severe censure. It is not, strictly speaking, a retrospective law. It authorizes the future imposition and collection of a tax according to a past assessment. This was within the legislative power. * * * The act does not involve the exercise of a judicial function. It provides for the passage of a new ordinance. The point ruled in the case of Municipality No. 3 v. Michoud, 6 Ann. 605, has no application to the present case. The municipality, there, attempted without any legislative authorization, to revive back taxes which had been remitted, 1 Municipality v. Wheeler, 10 Ann. 746.

In the case of the city of New Orleans v. Cordeviolle & Lacroix, the defendants were sued for taxes imposed under the same law and ordinance reviewed by the Supreme Court in the case of Wheeler & Blake. The counsel for the defendants was the judge *a quo* in this case. But the court said: "This case is identical with that of Municipality No. 1 v. Wheeler & Blake. The constitutionality and legality of the law and ordinance imposing the tax were fully discussed and determined in that case." 13 Ann. 268.

In the case of New Orleans v. P. D. Ponte, the Supreme Court was called upon again to review the decision in the case of Wheeler & Blake, and said: "In the case of the city of New Orleans v. Cordeviolle & Lacroix, 13 Ann. 268, the same point was decided in the same way, the Court observing that the constitutionality and legality of the law and ordinance imposing the tax in question, had been fully discussed in the previous case of Municipality No. 1 v. Wheeler & Blake." And the Court proceeded to add, with evident symptoms of impatience: "This is the *fourth time* that we are called upon to determine the point of the legality and constitutionality of what is termed the retroactive taxation by the city of New Orleans, under the provisions of the act of

February, 1850. The doctrine of *stare desis* finds in this instance its applicability." 14 Ann. 853.

Once more, in the case of the City of New Orleans v. Samuel Locke, one of the counsel for the plaintiffs in this suit was of counsel for Mr. Locke, and urged, with other defense, the same objections to the statute which had been so often before rejected by the court, and they were supported in an argument of great length, carefully prepared. There was judgment, however, in favor of the plaintiff, affirming the decision in the case of Poutz, 14 Ann. 854.

But the defendant was still dissatisfied with the decision of our courts upon this point, and by writ of error, carried the case to Washington. There the Supreme Court of the United States fully adopted the decision of our State Supreme Court, and, noticing the defense relied on, say: "There was nothing in the position taken which entitled it to consideration. In the first place, *the act was not subject to the imputation of being retrospective. It did not operate upon the past or deprive the party of any vested rights. It simply authorized the imposition of a tax according to a previous assessment.* In the second place, even if the law had been strictly retrospective, it would not have been within the constitutional inhibition." Locke v. New Orleans, 4 Wallace 173.

Surely these decisions of the Supreme Court of the State of Louisiana thus distinctly and unequivocally sustained by the Supreme Court of the United States, constitute a barrier of legal authority against the plaintiffs, which this court would be very slow to overleap. They establish that a tax, imposed according to a previous assessment, is not retrospective.

But this principle of law, so manifestly consonant to reason, does not rest upon the support of merely these authorities.

The same doctrine has been adhered to in repeated decisions of our own State, sustaining other taxes levied like this upon anterior assessment rolls.

In the case of the City of New Orleans v. The Southern Bank, suit was brought to recover of the defendants a tax assessed upon the capital of the corporation. The statute of twentieth March, 1856, clearly authorized the assessment of taxes upon the capital of the bank. The city did not avail itself of this right of taxation, however, until the twenty-third February, 1857, when an ordinance was passed levying a tax "on the tableau of assessment made by the State Assessors for the year 1856." On the nineteenth March, 1857, the Legislature exempted from municipal taxation all capital employed in free banking from and after that date. The collection of the tax sued for was resisted with much ability and determination. Among other objections it was urged that "the assessment is the basis of the tax as to its imposition, and must be in strict conformity to law, otherwise it is void and of no effect." The law then required the assessment rolls to be delivered on the first October, to the Board of Supervisors, who were to examine, equalize and correct the valuations. After this supervision, the rolls were to be delivered to the tax collectors, on the first Monday of December of each year. In the assessment made under these laws, the capital of the banks had been omitted; and a supplemental assessment was made in December which embraced the capital of the bank. The court sustained the tax imposed anterior to the law of the nineteenth March, exempting the banks from taxation. It said, "the law and Constitution require taxation to be equal and uniform, and by the seventy-fourth section it is provided that if lots, part of lots, squares, or other property be omitted in the assessment of one or more years, the same, when discovered, shall be assessed for the years during which it was omitted, and for the current year. Thus the validity of a tax levied in 1857 upon the assessment rolls of 1856, was sustained even after those rolls had been amended by a supplemental assessment made subsequent to the com-

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pletion of the regular assessment rolls; and the Court overruled the objection which is reproduced in this case by the plaintiff's counsel in the same words, that as the supplemental assessment was made in December 1856, "the power to make the assessment was already exhausted." *New Orleans v. Southern Bank*, 15 Ann. 91.

This decision maintains the right of taxation upon the assessment rolls of the previous year, and even goes so far as to sustain the validity of the act, permitting the back assessment of property, when discovered, which had been previously omitted, *for the years during which it was omitted*.

The same doctrine was again laid down by the Supreme Court in the case of the *City of New Orleans v. the Union Bank*, 15 Ann. 123.

The judge *a quo* has fallen into a grievous error with reference to the object and effect of the assessment roll of 1867. He says, "it formed as against the parties named in it, a valid contract to pay taxes for that year," and that the act of 1868 "*creates* for it a new force, imposes from it a new duty, or obligation, or liability;" and he inquires "could it be made to create a similar obligation in a subsequent year?" A similar objection to a local tax imposed by the Board of Levee Commissioners in the parish of Carroll was met and answered by the Supreme Court in the case of *Templeton v. the Board of Commissioners*. There the Levee Board, in October 1859, laid a tax upon the assessment roll of 1858. The Court say with regard to such taxes, that "they cannot be said to be assessed, until the ordinance fixing their amount has been passed. When it is passed, it refers to the previous assessment of the State as the most convenient mode of ascertaining the persons liable to to the local tax and the amount for which they are responsible. It is not the State tax roll which creates the indebtedness for the local tax, it is the ordinance which levies the tax." *Templeton v. Board Commissioners*, 16 Ann. 118.

Now, whilst it may be true that the regular annual State tax may be said to be assessed upon the final completion of the assessment rolls, such is not the case with a special tax levied under a special statute. It is not the roll which creates the indebtedness; it is the special statute which levies the tax. In no sense can the imposition of a tax by the State be regarded as a contract. There never was a special tax imposed with the consent of all the tax payers.

It is a mistake to say that "an assessment of property should follow the act levying the tax;" and that "the tax and the assessment should be contemporaneous, that is, in the same year;" and that "the taxes of 1868 and the assessment of 1868, cannot be divorced." Plaintiff's brief, p. 30. Let any tax payer go to the State Tax Collector during the year 1868, and he will soon discover this mistake. Let him offer to pay the State tax on his property for that year, and his offer will be refused. Let him even go in the month of January, 1869, and his money cannot still be received. He will be told that his property has been assessed in the year 1868, but that his tax is not legally ascertained and has not been levied, and cannot be collected until the first day of February, 1869. Let him go to the City Hall, and offer to pay his city tax for 1868 at any time during that year, and he will be told that no step towards fixing its amount has yet been taken, except that his property is in process of assessment; and that in 1869 the rate of his tax will be fixed, according to the assessment of 1868, and he cannot pay the tax even then before June, 1869.

Thus the customary city and State taxes which our people have always been in the habit of paying, are infected with the same pernicious principles of "retroaction" which is said to exist in the statute of 1868. Yet the system has been acquiesced in by the community until now, with the approval of the courts.

Indeed, it is far more equitable and proper that taxes should be levied

after the value of the property to be taxed has been ascertained than before. Although the amount of a tax rests within the discretion of the taxing authority, it is yet wise and in accordance with the practice of Republican governments to demand of the citizen only such contributions as may be necessary to the service of the State. In order to fix the rate of taxation and prevent excessive and unnecessary, or insufficient taxation, it becomes important to know the value of the property liable to be taxed. This value is ascertained from the assessment rolls. Thus the exact amount of money required to be raised by taxation, and no more, and no less, becomes known, and taxation is fixed according to the exigencies of the government, and can be equally apportioned among individuals.

The mode of taxation complained of as being retroactive because the tax is levied upon a previous assessment, has been shown to be in accordance with usage in Louisiana, and to have been sanctioned by the courts. It is quite common, and has been adopted by this State from most of the States of the Union.

But it is said that under the clause of article 118 of the Constitution it is provided that "all property is to be taxed in proportion to its value, to be ascertained as directed by law;" and that the terms "to be ascertained," imply a future assessment, and "as directed by law," and exclude the adoption of an existing assessment. *Ex vi terminorum*; no such future assessment is required. All that this clause in the constitution requires is that property should be taxed according to its value. And that its valuation shall be fixed or "ascertained" by law. A similar provision is to be found in most of the constitutions of the other States, but the construction claimed by the plaintiff's counsel has nowhere been sanctioned by authority.

"Whenever it is made a requirement of the State Constitution that taxation shall be upon property according to value, such a requirement implies an assessment of valuation by public officers at such regular periods as shall be provided by law, and a taxation upon the basis of such assessment until the period arrives for making it anew. Thus, the Constitutions of Maine and Massachusetts require that there should be a valuation of estates within the commonwealth to be made at least every ten years; the Constitution of Michigan requires the annual assessments which are made by township officers to be equalized by a State board, which reviews them for that purpose every five years; and the Constitution of Rhode Island requires the Legislature, "from time to time," to provide for new valuations of property for the assessment of taxes in such manner as they may deem best. Some other constitutions contain no provisions upon this subject; but the necessity for valuation is necessarily implied, though the mode of making it, and the periods at which it shall be made, are left to the legislative discretion." Cooley's Constitutional Limitations, p. 496.

In Ohio, whose Constitution, like ours, prohibits retroactive legislation, the Legislature in 1852 fixed the value of the real property of the State upon the valuation of the year 1851, and required that previous valuation to remain for "taxation for all purposes that are or may be required by law to be levied and collected" until a revaluation was made. Swan's Rev. Stat., p. 934. By the law of that State the assessment rolls of real property are revised and the valuation equalized "every sixth year." Swan's Rev. Stat., p. 917. The legislation of Ohio on this subject is here particularly cited, because the plaintiff's counsel lay great stress upon the constitutional prohibition of retrospective laws in that State; and because no case can be found in Ohio where it has been held or even urged that taxes levied upon existing assessments were in conflict with the constitutional provision referred to.

In the case of Carrington v. Farmington, the town of Farmington at its annual meeting, on the first Monday of October, 1850, laid a tax of

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four cents on a dollar, on the assessment lists of October, 1849, which was the assessment list of that town then last made, and on which an annual tax was laid in October, 1849, and duly collected. The plaintiff claimed that said tax could not be legally laid upon said assessment list. The Supreme Court of Errors of Connecticut held: "It rests with the Legislature alone to direct on what list a tax shall be laid; and the Legislature gives the range of two years, and it might give more; it might direct an assessment list to be made only once in three or five years. This latitude may, and we believe not unfrequently does, lead to inequality in taxes, but this is the result of the latitude allowed by the law of 1826, rather than anything else. Ever since that statute, and indeed before it, towns could lay a tax two years successively on the same list, while the property taxed had so changed hands that the taxes were actually imposed on persons who had sold their property, and not on those who had bought and enjoyed it. Taxation, at best, is somewhat arbitrary and unequal. Money is sometimes wanted immediately, so that a tax must be laid on the list last completed to meet the existing emergency, while sometimes delay is practicable." 21 Conn. Rep. p. 71.

In the case of *Shaw v. Dennis*, the Supreme Court of the State of Illinois thus disposed of an objection similar to that presented by the counsel in this case, to the statute of 1868. Judge Caton in that case said: "There is another objection urged to the validity of this law. The act directs the commissioners, in determining who is liable to pay said tax and the amount each shall pay, to be governed by *the last assessment of taxable property in said county*. It is insisted that this is an unjust criterion, for a man might have disposed of all the taxable property assessed to him in the last assessment, before this tax was actually declared by the commissioners. This objection is more refined than practical, and if allowed, would at once annihilate the power of taxation. The assessment of the tax and the valuation of the property are never simultaneous acts. The county tax is assessed or declared by the county commissioners' court at their March term, and the assessment of the valuation and owners of the taxable property need not be completed till September following. Under this system the same injustice may be committed, for a man may be compelled to pay a tax for a whole year on property which he has only owned for a single day. Indeed, the same horse may be assessed to two different individuals for the same year, for each might own him at the time the assessor takes the list of his property, and yet a third person may have owned him at the time the tax was actually imposed. In the same way other property might go unassessed altogether. In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. If we attempt it we might have to divide a single year's tax upon a given article of property among a dozen individuals who owned it at different times during the year, and then be almost as far from the desired end as when we started. The proposition is Utopian. The Legislature must adopt some practical system, and there is no more danger of oppression or injustice in taking a former valuation, than in relying upon one to be made subsequently. We have no doubt but this act is clearly within legislative power, and must be enforced." 5 Gillman Ill. Rep. p. 418.

In *Pitcher v. Jackman, et al.*, the Supreme Court of Indiana held that the appraisement of the real estate of the State made under a statute passed in 1851 was adopted by an act passed in 1852, and should stand as the "grand levy of the State," and sustained a tax levied in 1857 upon the appraisement of 1851. The court thus disposes of the objection as to the want of equality and uniformity in the tax; "It is contended that the appraisement and valuation in question had ceased to be equal and uniform before 1857, the year in which the tax against

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the appellee was levied. It is true, the Constitution, article 10, section 1, declares 'that the General Assembly shall provide by law for an equal and uniform rate of assessment and taxation,' etc. But we perceive no such want of uniformity on the face of the act continuing the assessments made in 1851; and if, in point of fact, these assessments had in 1857 ceased to be uniform, it was for the Legislature, and not the courts, to secure the desired uniformity. Evidently, the courts are invested with no authority appropriate to such a duty." 15 Indiana Rep. p. 109. See *Aulauiet v. the Governor*, 1 Texas 653; and also *Municipality No. 2 v. Duncan*, 2 Ann. 183; *State v. Poydras*, 9 Ann. 165; *Layton v. New Orleans*, 12 Ann. 515.

LUDELING, C. J. The plaintiff obtained an injunction against the defendant to restrain him from collecting the taxes levied upon plaintiff's property, by an act of the General Assembly of the State of Louisiana, approved on the twenty-ninth day of September, 1868. The petitioner avers that the tax is illegal; that the act No. 114, of the General Assembly, approved twenty-ninth of September, 1868, is not law, and is without force or validity; that it was not passed with the forms and solemnities prescribed by the Constitution of Louisiana, and that its passage was in violation of article forty-two of the said Constitution; that it was not read in each house on three several days; and that four-fifths of each house, which passed it, did not order a suspension of the Constitutional rule requiring such reading. That said act is also in contravention of articles one hundred and ten, and one hundred and eighteen of the Constitution aforesaid; that it is retroactive, and is forbidden; that it attempts to impose a taxation not equal and uniform, and to tax property not in proportion to its value to be ascertained as directed by law.

The defendant admitted that, in the discharge of his duties as tax collector, he did notify the plaintiff as set forth in the petition, and did attempt in a legal manner to collect the tax; and he avers, that while attempting to do so he was restrained by the injunction issued in this case. He prays that the injunction may be dissolved, and that plaintiff be condemned to pay all costs with twenty per centum general damages, etc.

The District Court rendered judgment in favor of the plaintiff, perpetuating the injunction; and the defendant appealed.

The questions to be decided are—

I. Was the tax act of the General Assembly of September 29, 1868, passed without observing the formalities required by the Constitution of this State?

II. Is it retroactive?

III. Is it equal and uniform; and does it tax all property in proportion to its value to be ascertained as directed by law?

First.—We deem it unnecessary in this case to decide whether courts are authorized to go behind an enrolled and duly authenticated and promulgated statute to examine the journals of the Legislature, or

other evidence, to ascertain if the formalities prescribed by the Constitution have been observed in its passage; for, if we admit the right, we find in the journals of the House, proof that the requirements of the Constitution were observed.

"Mr. Morey, of Ouachita, *under a suspension of the rules*, offered the following bills, which passed their first and second readings, one hundred and fifty copies of each ordered to be printed, and bills referred to the Committee on Ways and Means."—House Journal, p.

So far as we are informed, this action was unanimous. No one opposed the suspension of the rules; no one tested its correctness by calling for the yeas and nays.

But it is contended by the plaintiff's counsel that "according to grammatical construction * * all that was done here, 'under a suspension of the rules,' was the introduction or 'offering' of the bills." In construing a law, and, *a fortiori*, an entry in the journals of the House, we are to have reference to the object or intention of the Legislature rather than to the niceties of grammatical rules. C. C. arts. 14-16. Commercial Bank v. Foster, 5 An. 516; 6 An. 386. State v. Poydras, 9 An. 165.

The journals show, not only that notice of the bill previous to its introduction, and the taking it up in its order were dispensed with, but also that the bill "*passed its first and second readings*" under a suspension of the rules. We must construe this entry of the journals so as to make the acts of the members of the House conform to their *sworn duty*, rather than in such a manner as to make the legislators recreant to their constitutional obligations.

We can see no room for doubting as to what is meant in article forty-two of the Constitution by "four-fifths of the House." The article declares: "No bill shall have the force of a law, until, on three several days, it be read in each house of the General Assembly, unless *four-fifths of the house*, where the bill is pending, may dispense with the rule."

Article thirty-three declares, Not less than a majority of the members of each house of the General Assembly shall form a quorum to transact business." It is competent then, for a majority of the members of each branch of the General Assembly to entertain the reading of a bill; and when only a majority of the members are present, they constitute the house.

Therefore, by the terms "each house" and "the house" in article forty-two must be meant the quorum necessary to do business; "the house" mentioned in the second clause of the article evidently refers to the same house mentioned in the preceding clause. See 1 Kent's Com. p. 249; note b. Pascal's Annotated Constitution, p. 93, and authorities there cited.

Second.—We think the law is not retroactive. It has no retrospective effect; it does not operate upon any contract, or right, or subject, in the

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past, but it provides simply that a tax for the payment of existing debts shall be levied "upon the cash assessed value of the immovable and movable property of the State, according to the assessment rolls for the year 1867," the last assessment which, at that time, had been made.

"Every law that is to have an operation before the making thereof is retrospective." 3 Dal. 349. The converse of this proposition is equally true, and in our opinion the act of the twenty-ninth of September, 1868, is altogether prospective in its operation.

In the case of Municipality No. 1 v. Wheeler & Blake, the defendants contended the act of seventh of February, 1850, empowering each of the municipalities of New Orleans to levy taxes on capital *on the assessment rolls of 1848 and 1849*, was unconstitutional and void, *because it was retroactive in its operation*.

The Constitution of 1845, in existence when the law was passed, did not prohibit retroactive legislation.

The court, referring to this fact, said: "However repugnant to logic and sound policy they may be, retrospective laws in civil matters, do not violate the Constitution, unless they tend to divest vested rights, or to impair the obligation of contracts, neither of which can be predicated of the act in question. * * * *

"But the law under consideration does not seem to be obnoxious to severe censure. It is not strictly speaking a retrospective law. It authorizes the *future* imposition and collection of a tax *according to a past assessment*. Shaw v. Dennis, 5 Gillman 418; Opelousas and G. W. R. R. Co. v. Harris, 10 An. 677."

It is contended that this is an *obiter dictum*, and not binding even on the court which made it. It is true that the case might have been decided without passing on this point, but unquestionably the court had the right to decide the question, for it was presented by the pleadings and in the arguments before the court. And from the dissenting opinion of Mr. Justice Buchanan, as well as the statements of the plaintiff's counsel, who was the organ of the court in announcing the opinion of the court in that case, it seems that the question was maturely considered and fully discussed. The reason, therefore, for not heeding *obiter dicta* does not exist in this case. This decision was reaffirmed in New Orleans v. Cordeville & Lacroix, 13 An. 268; New Orleans v. Poutz, 14 An. 853; and in New Orleans v. Locke, 14 An. 854. The last case was appealed to the Supreme Court of the United States, and is reported in 4 Wallace, p. 173. That court said: "There is nothing in the position taken, which entitles it to consideration. In the first place *the act was not subject to the imputation of being retrospective. It did not operate upon the past, or deprive the party of any vested rights. It simply authorized the imposition of a tax according to a previous assessment.*"

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This too is said to be *obiter dictum*. Be it so. It was the opinion of nine Judges of the highest tribunal in the country. And after a careful examination of it, our judgments approve it. See *City of New Orleans v. the Southern Bank*, 15 An. 123; 16 An. 119. Also Cooley's *Constitutional Limitations*, p. 496. *Carrington v. Farmington*, 21 Conn. Rep. 71.

Third.—This law imposes an equal, uniform and *ad valorem* tax; one per centum is to be levied upon the cash assessed value of the immovable and movable property of the State. No discrimination is made. See *State v. Volkman*, recently decided.

The value is "to be ascertained as directed by law;" that is, the law shall direct *how* the value shall be ascertained. In this case the law directed that the value should be ascertained by adopting the assessment last made in the State. The exercise of a discretion vested in the Legislature by the Constitution cannot be questioned by this court.

Judge Cooley in his treatise on the *Constitutional Limitations* which rest upon the legislative powers of the States of the American Union, says: "It is not essential to the validity of taxation that it be levied according to the rules of abstract justice. It is essential that the Legislature keeps within its proper sphere of action, and not impose burdens under the name of taxation which are not taxes in fact; and its decision must be final and conclusive. *Absolute equality and strict justice are unattainable* in tax proceedings. The Legislature must be left to decide for itself how nearly it is possible to approximate so desirable a result. It must happen under any tax law that some property will be taxed twice, while other property will escape taxation altogether. Instances will occur where persons will be taxed as owners of property which has ceased to exist. Then the man who owns property when the assessment is taken may have been deprived of it by accident or other misfortune before the tax becomes payable; but the tax is nevertheless a charge against him. And when the valuation is only made once in a series of years, the occasional hardships and inequalities in consequence of relative changes in the value of property from various causes become sometimes very glaring. Nevertheless, no question of constitutional law is involved in these cases, and the legislative control is complete." Cooley's *Constitutional Limitations*, 413.

The same author says, "In *Shaw v. Dennis*, 5 Gillman 418, objection was taken to an assessment made for a local improvement *under a special statute*, that the commissioners in determining who should be liable to pay the tax, and the amount each should pay, were to be governed by *the last assessment of taxable property in the county*.

It was insisted that this was an unjust criterion, for a man might have disposed of all the taxable property assessed to him in the last assessment before this tax was actually declared by the commissioners. The court, however, *regarded the objection as more refined than practical*, and one that, if allowed, would at once annihilate the power of tax-

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ation. "In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. * * * The proposition is Utopian. The Legislature must adopt some practical system; and there is no more danger of oppression and injustice in taking a former valuation than in relying upon one to be made subsequently." 5 Gill. Ill. 418; Petcher v. Jackman, 15 Indiana R. 109; 1 Texas R. 662.

We cannot perceive wherein the statute in question violates in any manner, the Constitution of this State.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of the defendant, dissolving the injunction issued in this case, with twenty per centum on one hundred and thirty-five dollars, amount of taxes whereof the collection was enjoined, as general damages, and that the plaintiff pay the costs of both courts.

Rehearing refused.

NO. 2002.—THE MECHANICS' AND TRADERS' BANK, Appellee, v. JOHN M. SANDERS, Appellant.

Where an obligation or note is prescribed and the holder shows nothing that will operate an interruption or suspension of prescription, the plea will prevail. 20 An. 131, 423, 565.

APPEAL from the Third District Court, parish of Terrèbonne, *Gates, J. Winchester Hall, John A. LeBlanc, and T. P. Sherburne*, for appellee. *Bash & Goode*, for appellant.

WYLY, J. This action is based upon a promissory note made by the defendant on the fifteenth February, 1858, and due three years after date, to wit: fifteenth February, 1861.

The defense is, prescription of five years, general denial, and an allegation that the note was given for slaves.

Judgment was rendered in the District Court for plaintiff for the amount claimed by him and defendant has appealed.

There is no evidence in the record that prescription was ever renounced by the defendant or that it was ever interrupted by partial payment or acknowledgment or promise made by him.

The note matured fifteenth February, 1861, and the defendant was not served with citation till sixteenth April, 1867, six years and two months after its maturity.

Plaintiff has invoked the maxim *contra non valentem agere non currit prescriptio*, urging that suit was not "sooner instituted on said note by reason of the secession of the State of Louisiana from the Federal Union, and the consequences growing out of the same, and the hostile attitude in which the State placed itself toward the government of the United States in the recent war, averring that from twenty-sixth January, 1861, to the first June, 1865, by reason of said war and rebellion of the State of Louisiana and other southern States against the

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government aforesaid, there was not in the parish of Terrebonne any duly constituted and legal court, nor any duly qualified judge, sheriff, or clerk of court, and that between said dates civil process was suspended and kept in abeyance by reason of said war."

The evidence in the record does not establish these allegations of plaintiff.

It appears that the Federal forces took possession of the archives and occupied the parish site of Terrebonne parish from the month of October, 1862, till the end of the war; that the court was organized under Federal authority, and that suits were filed and process served by the clerk and sheriff during the year 1863 and subsequently.

The evidence is sufficient to satisfy us that plaintiff could have filed suit on this note in the parish of Terrebonne at any time after the occupation of that parish by the Federal forces, in October, 1862, and there is no just reason to invoke the maxim *contra non valentem agere non currit prescriptio*.

But even if he could not do so till the first of June, 1865, as alleged by him, there was ample time to institute suit between that time and fifteenth February, 1866, the period at which the prescription of five years accrued.

The plea of prescription must prevail. 20 An. 131, 423.

It is therefore ordered and decreed that the judgment of the court below be avoided and annulled, and it is now ordered that there be judgment in favor of the defendant, dismissing this suit at plaintiff's costs in both courts.

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No. 1943.—STATE OF LOUISIANA, ex. rel. J. W. CREAGH v. THE JUDGE OF THE SEVENTH JUDICIAL DISTRICT, Parish of Avoyelles.

In a proceeding by mandamus to recover possession of the books, keys, &c., in which the office of sheriff is kept, the party against whom the writ is directed must show an interest in the possession of such property exceeding five hundred dollars to entitle him to a suspensive appeal from the judgment ordering him to deliver possession to the claimant.

APPEAL from the Seventh Judicial District, parish of Avoyelles. *A. Miller, J. E. North Collum and E. W. Grant* for relator. *G. Merrick Miller*, respondent, in personam.

HOWELL, J. The petitioner avers that J. J. Ducoti, alleging himself to be the legal acting sheriff of the parish of Avoyelles, obtained from the District Judge a writ of mandamus, which was made absolute, ordering petitioner, who was then the duly elected, qualified and acting sheriff of said parish, to surrender to said Ducoti the office-room, keys, books and papers of said sheriff's office, thereby enjoining petitioner, by compelling him to vacate his office, whilst he held a valid commission therefor, by virtue of which and a former judgment of the said judge, he had given bond and qualified according to law; that he

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immediately applied for a suspensive appeal from said order, which was refused and instead thereof a devolutive appeal was granted; that the matter in dispute exceeds one thousand dollars, and having complied with the law, he is entitled to a suspensive appeal, and he prays for a writ of mandamus directing the said judge to grant it to him.

In answer, the judge admits the allegations of the petition, except that said Creagh was, at the date of the application, the lawful sheriff of Avoyelles, or was injured by the order complained of; and he alleges that at said date a suit, instituted by said J. J. Ducoti, contesting petitioner's right to said office, had been duly tried before respondent and a jury, a verdict given in favor of said Ducoti and a judgment rendered thereon, which had become final between the parties and from which, by law, no appeal could be allowed; that thereupon a commission was issued by the Governor to said Ducoti; that the order complained of was only and substantially carrying into effect the final judgment in the said contested election case, and a suspensive appeal as asked for would be an indirect manner of obtaining a suspensive appeal from said final judgment, which was not appealable; and he refers us to the act of 1855, relative to elections, pp. 415, 416, §§ 44, 46, for the law declaring such judgments final and authorizing the Governor to issue a commission as stated.

While the judge is in error as to the law relative to appeals in contested election cases (see Acts 1856, p. 9; Acts 1868, p. 220) his answer states sufficient reasons to justify his conduct. From the showing made, the petitioner, if he has not acquiesced therein, has permitted the judgment in the contested election case to become executory and he cannot in this indirect manner stay its execution. He does not, besides, show that the office-room, keys, books and papers are his property or that his pecuniary interest therein exceeds five hundred dollars. The allegation that the matter in dispute exceeds one thousand dollars does not change the legal status of the said room, keys, books and papers pertaining to the sheriff's office, nor show his interest therein to be of such value. The facts do not show such interest as to sustain the jurisdiction of this court.

It is ordered that the rule taken herein on the twelfth December, 1868 be discharged with costs.

No. 1998.—WASHINGTON JACKSON, JR., Appellant v. JOHN YOIST, Administrator, Appellee.

When the holder of a promissory note has suffered it to prescribe in his hands he cannot invoke the maxim, *contra non valentem agere non currit prescriptio*, to relieve it from the effect of the plea of prescription. This maxim has no application under our system of jurisprudence. See the case of *Rabel v. Pourciau*, 20 An. 131. *Smith v. Stewart*. (Ante page 67.)

APPEAL from Seventh District Court, parish of Pointe Coupee. Posey, J., of the Fifth District Court, presiding. *Cooley & Philips*, for plaintiff. *Race, Foster & E. T. Merrick* and *A. Provosty*, for defendant.

Washington Jackson, Jr., Appellant, v. John Yoist, Administrator, Appellee.

LUDELING, C. J. Plaintiff sues to recover the amount of a promissory note and to enforce the mortgage given to secure the same.

Defendant pleads the prescription of five and ten years to the note and ten years to the mortgage, and alleges that the land, the object of the contract of mortgage, has been sold by order of the court in due course of administration of the estate of W. M. Guin, deceased, and the proceeds appear as assets in the final account of said estate pending before the court for homologation.

On the trial, the plea of prescription was sustained, and plaintiff's action dismissed. Plaintiff has appealed.

The note declared upon was made on sixth November, 1857, payable four years after date, to wit: sixth November, 1861. This suit was filed on twentieth January, 1868, more than six years after the maturity of the note. The mortgage was inscribed in the mortgage office on the ninth day of November, 1857, and was not reinscribed till thirteenth day of January, 1863, more than ten years thereafter.

We find in the record no evidence of the renunciation of prescription, nor any acknowledgement or promise to pay made by the defendant interrupting prescription.

Plaintiff has introduced evidence proving that in March, 1863, General Banks' army passed through the parish of Pointe Coupee, that sometimes the Confederates and sometimes the Federals were riding over the parish, and at various times there was skirmishing between the Federals and Confederates and there was a general uneasiness and alarm in the parish; that this state of things continued from that time till the surrender of the Confederate armies.

It is also in evidence that the clerk and sheriff of the parish were sworn in on sixteenth June, 1865.

The prescription of five years did not accrue on the note till sixth day of November, 1866, more than sixteen months after the organization of the clerk's and sheriff's offices in the parish of Pointe Coupee. The plaintiff had ample time to institute his action during this period. But he seems to have slumbered on his rights till twentieth January, 1868, when this suit was filed. After delaying the filing of his suit from the month of June, 1865, when the war ended, till twentieth January, 1868, he cannot avoid the consequences of his tardy action by claiming the allowance of the *utile tempus*.

The maxim *contra non valentem agere non currit prescriptio* cannot relieve plaintiff of the plea of prescription. (See the case *Rabel v. Pourcian*, 20 A. 131, and the authorities there cited.)

It is therefore ordered that the judgment appealed from be affirmed with costs.

Jared Williams, Appellee, v. Edward J. Gay, Appellant.

NO. 2022.—JARED WILLIAMS, Appellee, v. EDWARD J. GAY, Appellant.

Two parties, A and B, were engaged as partners in the cotton trade, one residing within the Federal lines of military occupation and the other in the Confederate lines; during the late war, between whom all trade was interdicted. They engaged the services of C to haul the cotton through the lines. Held—That, C could not recover wages on the ground that he was engaged in illicit traffic, expressly prohibited by law.

Each item charged in an account as money paid out, or for services rendered, is prescribed in three years from its date.

APPEAL from the Fifth Judicial District Court, parish of Iberville. *Posey, J. Fuqua & Callihan*, for appellee and plaintiff, *Banon & Pope*, for appellant and defendant.

HOWE, J. The plaintiff sued upon an open account for services performed and money paid out from the tenth January, 1864, to the sixth October, 1865. There was judgment in his favor for the whole amount claimed, and the defendant has appealed.

The prescription of three years was pleaded by defendant in the court below, and, as he was not cited until May 2, 1867, the plea must prevail against all the items in the account except the last two.

The items which are not prescribed are, one for \$200 cash, paid out in December, 1864, and one for \$500, for four months' services in attending to ginning and shipping cotton, from June 6, 1865, to October 6, 1865.

The first of these cannot be allowed, since it appears from the evidence that it was paid for hauling cotton in the course of an illegal traffic in this staple across the lines during a state of war, when such traffic was strictly prohibited, and for account of a partnership illegally formed between the defendant residing in the town of Plaquemine, and one Lobdell, residing beyond the lines. It is plain that plaintiff was aware of the character of this partnership and its operations, and cannot invoke the help of the court as to this part of his claim.

The remaining item of \$500, for services performed from June 6, 1865, to October 6, 1865, is not liable to this objection. Active hostilities had ceased, the lines had been opened to trade, and we are satisfied from a consideration of the record as a whole (a record, we may remark, which is so illegible as to render its consideration very difficult), that the plaintiff performed these services in regard to cotton owned by the defendant and J. L. Lobdell, and as to which they were commercial partners and bound *in solido*; that the defendant was liable to be sued alone, the partnership having been dissolved, and that the plaintiff is entitled to recover this amount.

It was contended as one defense that the plaintiff had been unfaithful in the discharge of his duties, but we do not think the charge sustained. The partners seem to have quarreled, and the plaintiff's obedience of certain orders of Lobdell may have wrought injury to the defendant, but no bad faith on plaintiff's part is proved, and Lobdell's orders were as binding on him as those of Gay.

Several bills of exceptions were reserved by defendant, but he insists on one only, an exception to the action of the judge in striking

Jared Williams, Appellee, v. Edward J. Gay, Appellant.

from his amended answer before permitting it to be filed the allegation that plaintiff was unfaithful "in aiding the said Lobdell to withhold from respondent cotton which had been purchased for joint account, and which was to be shipped to respondent's house in New Orleans." We do not think the court erred. The amended answer was filed on the day the cause was tried, and many months after the original answer. The allegation stricken out was one which introduced a new issue, and the court in permitting the amended answer to be filed at so late an hour exercised only a proper discretion in striking out this clause.

For the reasons given it is ordered that the judgment appealed from be reversed, and proceeding to give such judgment as the court below should have rendered, it is ordered and adjudged that the plaintiff have judgment against the defendant for the sum of five hundred dollars, with interest from judicial demand, with costs of the lower court; the plaintiff to pay the costs of the appeal.

No. 6314.—F. M. Fisk, Administrator and Appellant, v. A. BERGEROT, et al., Appellees.

Where the law is changed after prescription begins to run, the time elapsed before the change is to be computed according to the old law, and that which follows according to the new.

A PPEAL from the Sixth District Court of New Orleans, *Howell, J. T. A. Bartlette*, for appellant. *Wm. H. Hunt* and *Denegre*, for appellee.

Howe, J. In April, 1854, a female slave, alleged to have been owned by W. H. Fisk, now deceased, escaped from a negro traders' yard in New Orleans, and concealed herself in the city until December, 1854; when, disguised in male attire, she sailed from this port to Havre on a ship owned by defendants.

On the sixth of March, 1853, this action was instituted by the plaintiff, administrator, to recover the value of the fugitive with damages.

The claim of the plaintiff was dismissed by the judge *a quo*, on the ground that it had been barred by the prescription of one year.

We see no error in this judgment.

The plaintiff insists that the action is instituted under the act of March 25, 1835, which provides a prescription of five years. But this act was repealed by the act of March 15, 1855, and the case remitted to the general rule of the Civil Code which the latter law expressly left in force. Three years and five months elapsed from the time the fugitive took passage until the suit was brought; and following the rule settled by this court, that where, as in this case, the law is changed after prescription begins, the time elapsed before the change is to be computed according to the old law, and that which follows according to the new, the claim is barred. 6 La. 660; 11 L. 57; 10 A. 583.

F. M. Fisk, Administrator and Appellant, v. A. Bergerot, et al., Appellees.

The rule *contra non valentem*, etc., if it exists at all under the Code of Louisiana, is not applicable to this case. By article 3502 of the Civil Code the prescription began to run December 7, 1854, and the record does not disclose any allegation or fact sufficient to take the case out of the rule laid down in this article.

The judgment is therefore affirmed with costs.

Rehearing refused.

Mr. Justice Howell recused.

No. 2043.—WILLIAM A. BRITTON & Co., in liquidation, v. THE HEIRS OF JOHN F. SCOTT, deceased.

In a suit by the holder of mortgage notes against the succession, and the heirs, who, it is alleged have taken possession without settling up the estate, the record must show that the original maker of the notes is dead, and that the heirs are in possession of the property. In such a case, where citation has issued to the heirs, and judgment by default has been confirmed against them and appeal taken therefrom, the case will be remanded to the lower court to be proceeded with according to law.

A PPEAL from the Thirteenth Judicial District Court, parish of Tensas, *Hough, J. H. B. Shaw*, for plaintiffs and appellees, *Leach & Lewis*, for defendants and appellants.

Howe, J. This action was instituted on two mortgage notes, executed by John F. Scott, one due February 18, 1862, the other due February 18, 1863.

The petitioners, among other averments, allege as follows:

“The said John F. Scott, has departed this life, and his succession was and is yet legally open in this parish; that he left surviving him three children who were his legal heirs, Amelia Scott, Louisa H. Scott and John G. Scott, who have accepted his succession and are now in possession thereof, and liable respectively for their virile portions of the debts of the said deceased.”

They pray for “judgment against the succession of John F. Scott, deceased, as represented by his said legal heirs, and against said heirs respectively for their virile portions,” and for the enforcement of the mortgage.

Amelia Scott (Mrs. Doniphan) was cited April 16, 1867; Louisa H. Scott (Mrs. Cuney) was cited April 19, 1867; John G. Scott was cited March 12, 1868.

They made no appearance and judgment by default was confirmed November 13, 1868. The judgment is “against the succession of John F. Scott, represented by Amelia Scott * * * Louisa H. Scott * * * and John G. Scott, children and heirs at law of said John F. Scott, deceased,” and for a seizure and sale of the mortgaged property.

From this judgment the parties cited as above have appealed, and have pleaded in this court the prescription of five years.

The whole claim is plainly prescribed as to John G. Scott. As to the other parties cited the note falling due February 18, 1862, is prescribed.

William A. Britton & Co., in liquidation, v. The Heirs of John F. Scott, deceased.

The record does not show that John F. Scott is dead, nor that his succession was ever opened, nor that the parties cited ever accepted the succession or took possession of it.

Under such circumstances we think that in the interest of justice and regular practice the case should be remanded. It is therefore ordered that the judgment appealed from be avoided and reversed, and that the cause be remanded to be proceeded with according to law.

No. 1967.—THE STATE OF LOUISIANA, ex. rel. SAMUEL JOHNSON, v. THE JUDGE OF THE FIFTH DISTRICT COURT of the Parish of Orleans.

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The right of appeal is a constitutional right, and does not depend upon the discretion or pleasure of the District Judge. Const. art. 74. The right to determine primarily whether the appellant has complied with the requirement of the law is vested in the District Judge, but his decision is subject to the revision of the Supreme Court. The proper remedy for correcting the illegal rulings of the District Judge in dismissing the appeal or declaring it devolutive only, after a suspensive appeal has been granted or a bond has been filed, is by writ of prohibition and not by *mandamus*.

APPPLICATION for a *Mandamus*. *G. Schmidt*, for petitioner for *mandamus*.

LUDELING, C. J. F. A. Cousin & Bro. obtained a judgment against Samuel Johnson for five thousand six hundred and eight and five one hundredths dollars, with legal interest from thirtieth September, 1867, in the Fifth District Court of the parish of Orleans.

Johnson applied for and obtained an order for a suspensive appeal, and he alleges, under oath, that within the legal delays, he furnished a bond for an amount exceeding one-half the sum he had been condemned to pay, with good and solvent security, as the law required.

Subsequently the plaintiff obtained an order from the District Judge commanding Johnson, the appellant, to show cause why the said appeal should not be dismissed; and after hearing the parties the appeal was dismissed. From this order dismissing the appeal, Johnson prayed for a suspensive appeal, which the judge refused to grant.

Whereupon Johnson applied to this court for a *mandamus* against the Judge of the Fifth District Court of the parish of Orleans to compel him to grant a suspensive appeal from the order dismissing the appeal, which he had already allowed.

In justification of his conduct the District Judge gave the following reasons:

First.—"Because the right of deciding whether an appeal, previously granted, shall be suspensive or devolutive is exclusively within the province of the court from which it was taken.

Second.—"Because the defendant having failed to furnish, within the ten days following the signature of the judgment on the merits, the bond required by law, the appeal granted could not stay execution.

The State of Louisiana, ex. rel. Samuel Johnson, v. The Judge of the Fifth District Court of the Parish of Orleans.

Third.—"Because the decree ordering execution to issue and from which a suspensive appeal is sought, is not a final judgment, and is not even represented as an interlocutory judgment, which may cause an irreparable injury, and it is from such only that the law allows a suspensive appeal.

Fourth.—"Because a suspensive appeal cannot be taken from such a decree, which does not condemn the defendant to pay any sum of money, deliver any property or perform any act."

Neither the petitioner nor the judge discloses upon what grounds the appeal granted was dismissed. The petitioner swears that within *the legal delays he furnished a bond with good security, for an amount exceeding one half the amount of the judgment appealed from.* While, on the other hand, the judge states that the appellant failed to furnish within the legal delays "*the bond required by law.*" He does not state wherein the bond was defective, if bad—or that, the bond, if good, was filed too late. We have not a copy of the bond before us. But the petitioner having sworn to the statements above mentioned, it was the duty of the judge to have stated distinctly wherein the appellant had failed to comply with the requirements of the law. The position of the judge, that he has *the exclusive right* to determine whether "an appeal previously granted, shall be suspensive or devolutive" is erroneous.

The right of appeal is a constitutional right; and its exercise is regulated by law; it is not dependent upon the discretion or pleasure of District Judges. Constitution, art. 74; C. P. art. 575.

If, therefore, the appellant furnished the bond required by law, within the legal delay, his right to a suspensive appeal is indefeasible. If, on the contrary, the bond furnished be not such as the law requires, or if it be given after the delay fixed by law in which the bond must be filed, for a suspensive appeal, execution may be issued under the judgment, notwithstanding the appeal. The right to determine, *primarily*, whether the appellant has complied with the requirements of the law or not, is vested in the District Courts. But their decisions are subject to the revision of the Supreme Court. If the appellant has complied with the provisions of the law any action, on the part of the District Judge in the case would be unauthorized, because the jurisdiction of the Supreme Court attaches so soon as the order of appeal has been granted and the bond required by law has been filed. C. P. art. 575; 4 La. 205; 7 La. 448; 15 La. 391; 13 La. 574; 1 R. 527; 10 R. 152; 8 An. 434; 17 An. 186.

Notwithstanding the District Judge might think the appellant had not complied with the law, yet he might be mistaken. It is for the Supreme Court to determine finally.

It would seem, however, that the proper mode of bringing such questions before this court is by writ of prohibition; because, if a District Judge assume jurisdiction in a case, after the appellant has complied with the law, which entitles him to a suspensive appeal, the judge is clearly exceeding the bounds of his jurisdiction. C. P. art.

The State of Louisiana, ex. rel. Samuel Johnson, v. The Judge of the Fifth District Court of the Parish of Orleans.

845; 13 La. 574; 19 La. 174; 19 La. 179; and 20 An. State ex. rel. Stackhouse v. Judge of the Fifth District Court, parish of Orleans.

The petitioner is entitled to relief, but we cannot accord it to him, in the form he has asked for it.

It is therefore ordered that the application for the mandamus be dismissed at petitioner's cost; reserving to him, however, the right to proceed against the Judge of the Fifth District Court by writ of prohibition, should it be necessary.

NO. 1485.—SUCCESSION OF CLEMENT WILKIN.

A nuncupative will by public act must bear upon its face the evidence that all the formalities required by law for its validity have been observed by the notary in drawing the testament. A nuncupative will by public act is null, if it does not appear on its face that the witnesses were present at the time the Testator was dictating it to the notary, and also when the notary read the instrument as written down by him, to the testator.

A PPEAL from the Second Judicial District Court, parish of Jefferson, *A. Cazabat, J. Lacey and Marks*, for plaintiffs. *T. L. Lemley*, for defendants.

HOWE, J. This is an action to annul the will of the late Clement Wilkin. From a judgment maintaining the will, the heirs at law prosecute this appeal.

The instrument in question is a nuncupative will by public act, and is in the following words (the dispositions, which it is unnecessary to consider in this case, being omitted):

STATE OF LOUISIANA—PARISH OF JEFFERSON.

Be it known, that I, **PLINY EARL DAVIS**, a notary public in and for the parish of Jefferson, on the fifth of March, 1865, repaired to the house of Clement Wilkin, an inhabitant of said parish of Jefferson and State of Louisiana, where, at his request and at his dictation, the following instrument was written by me, said notary, and declared by said Clement Wilkin to be his last will and testament.

In testimony whereof, the said Clement Wilkin has signed his name hereunto, in the presence of Christian Mehle, Jordan Thomas Aycock and James P. Thompson, lawful witnesses, residing in this parish, and me, the said notary, after having read the same in an audible voice in the presence of the testator and the said witnesses, without interruption and without turning aside to other acts. This the fifth day of March, 1865. The testator being weak, his signature appears irregular.

Original signed:

CLEMENT WILKIN.

Witnesses: CHRISTIAN MEHLE, J. T. AYCOCK, J. P. THOMPSON.
P. E. DAVIS, Notary Public.

Various grounds of nullity are urged, but in the view we have taken of the case it is necessary to consider only the following:

"It does not appear that the will was dictated by the testator, received by the notary, and by the latter written down in the presence of the witnesses."

It is well settled that, since a nuncupative will by public act makes full proof of itself, it must bear upon its face the evidence that all the

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formalities required by law for its validity have been complied with, inasmuch as the fulfillment of those formalities, when not apparent from the instrument itself, cannot be established by evidence *aliunde*. C. C. 1640; 16 La. 82.

The law details these formalities.

The article 1571 of the Code declares that—

“The nuncupative testament by public act must be received by a notary public in the presence of three witnesses residing in the place where the will is executed, or of five witnesses not residing in the place.”

“The testament must be dictated by the testator, and written by the notary as it is dictated.”

“It must then be read to the testator in the presence of the witnesses.”

“Express mention is made of the whole, observing that all those formalities must be fulfilled at one time without interruption, and without turning aside to other acts.”

What, then, is to be received by the notary? The law answers the question; the testament—not as already written, for the notary is to write it himself, but from the lips of the testator; the testator dictating his desires, and the notary writing what is so dictated in the presence of the witnesses required by law. And, as the will must afterwards be read to the testator in the presence of the same witnesses, at the same interview, the law has provided a double safeguard against both honest mistake and dishonest practice. 12 La. 114. 8 An. 469.

Express mention must then be made of the whole, that it may appear by authentic evidence that the commands of the legislator have been obeyed. On no other conditions will the law recognize the testament as legal, and suffer the established order of succession to yield to the desires of the testator.

It is plain that in the testament we are now considering there is no express mention that the witnesses were present at that important portion of the reception of the testament by the notary, which consists of the dictation and writing down. So far as the document informs us, one of the witnesses, as in the case of *Langley*, 12 La. 117, might have been absent during a part of the interview, or as in the case of *Alloway v. Babineau*, 8 An. 469, might have gone about town attending to his business during the process of dictation. None of the witnesses may have been present at all until the time when their presence is first indicated in the testament itself, namely, when the will was read aloud and signed. It is not for those who oppose the will to show that the witnesses were absent at some important moment; it is for the testament itself to show that they were present from first to last.

In *Christene v. Verbois*, 11 An. 108, a will apparently identical in form with the one in this case was annulled for the same reason now urged by the appellants. In *Devoll v. Palms*, 20 An. 283, a similar decision was made upon a testament of which the formal parts were, *verbatim*, those of the testament in this case. Each case was in affirmance

Succession of Clement Wilkin.

of the opinion of the District Judge. We consider the question settled, and settled correctly.

It is urged by appellees that the decisions cited are in conflict with the cases of *Pizerot v. Meullon*, 3 M. 144, *Stafford v. Stafford*, 12 L. 442, *Nelder v. McCarty*, 7 An. 485, and *Lawson v. Lawson*, 12 An. 604.

In *Stafford v. Stafford* the question now involved was not passed upon by the court.

In *Nelder v. McCarty* the language of the will expressed that the witnesses were present at the dictation and writing down, and there is no reason to say that the decision did not proceed upon the supposition that such mention was absolutely required. In *Lawson v. Lawson*, a case not entirely in point, the certificate of the notary was construed by two members of the court, at least, to show that all the formalities were "done" in the presence of the witnesses, and upon this mention together with an alleged defect in pleading they relied for maintaining the will. In *Pizerot v. Meullen* there seems to have been other considerations which were urgent in maintaining the will; but if that case, and the case of *Lawson*, go to the extent claimed by the appellees, they must be deemed to have been overruled.

We do not consider that the phrase "express mention" requires the use of any sacramental formula, but it certainly requires the use of some words which will make authentic proof that all the legal formalities have been fulfilled. There are no such words in the testament before us to prove that the witnesses were present before it was read aloud to the testator.

It is therefore ordered that the judgment appealed from be reversed; and, proceeding to render such judgment as ought to have been rendered by the court below, it is further ordered and decreed that the last will and testament of Clement Wilkin, deceased, be and the same is hereby declared null and void, and that the probate thereof be set aside, the costs in both courts to be borne by the estate.

Rehearing refused.

Mr. Justice Howell recused.

No. 2048.—SUCCESSION OF J. J. TYSON.

No person not a party to the suit in the court below, can be made a party, appellee, in the appellate court. In such a case the appeal will be dismissed for want of proper parties.

A PPEAL from the Thirteenth Judicial District Court, parish of Tennessee, *Hough, J. Julius Aroni* for appellant. *Mayo & Spencer* for appellee.

HOWELL, J. Edwin Morris, Wm. Talbert, J. G. Kyle and W. B. Evarts, as creditors of the succession of J. J. Tyson, deceased, took a rule on Samuel Lee, administrator, to show cause why he should not be removed from his office and Ransom Hall appointed in his stead. Lee answered that he could show no cause and that he desired the rule to

be made absolute. The court accordingly rendered judgment removing him and appointing Ransom Hall "administrator of said succession in the place of said Lee, upon giving bond according to law." Whereupon James Trabue, Dennis Long, Robert J. Kyle and Edwin Morris, alleging themselves to be creditors of said succession and aggrieved by said judgment, appealed therefrom by petition, citing Ransom Hall only, who moves to dismiss the appeal on several grounds, one of which is sufficient, to wit: that being no party to the suit from the judgment in which this appeal is taken, he cannot be cited nor made party as appellee in this court. This seems to be so clear as to require no reasoning. To entertain this appeal would be to take original jurisdiction of the only party sought to be made appellee. *Non constat* that he will ever make himself a party to these remarkable and irregular proceedings.

There being legally no appellee before us, this appeal must necessarily be dismissed.

It is therefore ordered that the appeal herein be dismissed with costs.

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No. 2054.—FLEMING & BALDWIN v. JOSEPH D. SHIELDS, J. B. JONES, use, &c., Intervenor.

An intervenor in an attachment suit will not be permitted to urge defenses personal to the defendant. The admissibility of testimony, the formality and regularity of the pleadings are matters pertaining exclusively to the defendant. His position in the case is limited to showing that he is the veritable owner of the property attached, or that he has a lien upon it superior to that of the attaching creditor.

APPEAL from the Thirteenth District Court, parish of Tensas, *Hough, J. H. B. Shaw* for appellee. *Farrar & Reeves* for appellants and intervenor.

WYLY, J. Plaintiffs sued out writs of provisional seizure and attachment against the property of the defendant, who was an absentee, alleging he owed them the amount of an account for advances and supplies furnished his plantation, in the parish of Tensas. The products and movables on the place and defendant's half interest in the plantation were seized under these writs by the sheriff on second December, 1867.

The defendant accepted service and waived legal and technical formalities. He also admitted the correctness of the account sued on, and set up no defense against plaintiff's demand.

On the tenth November, 1868, the intervenor filed his petition of intervention in this case, alleging that he held a mortgage bearing on said plantation or the undivided half thereof owned by the defendant; also alleging that the attachment was null and void because of the illegality of the affidavit, the insufficiency of the bond and other informalities; and by supplemental and amended petition he charged that the defendant, Joseph D. Shields, was in insolvent circumstances at the date of the levy of plaintiffs' writ of attachment to the knowledge of plaintiffs,

Fleming & Baldwin v. Joseph D. Shields, J. B. Jones, use, &c., Intervenor.

who fraudulently colluded with him to have said attachment levied upon said plantation in order to give, if possible, the lien of the attaching creditor a preference and priority over the special mortgage of the intervenor, which, by an oversight, was not recorded in the mortgage office of said parish, till a few days subsequent to the levy of said writ.

On the trial there was judgment in favor of plaintiffs for the amount claimed by them, with a privilege on the property attached, from the date the attachment was levied, to wit: second December, 1867; and the intervention was rejected at the costs of the intervenor.

From this judgment the intervenor has appealed.

From a careful examination of the record we are of opinion that the intervenor has failed to establish his allegation of fraud and collusion between the plaintiffs and the defendant; he has failed to establish that the defendant, Joseph D. Shields, was an insolvent at the time the attachment was levied and at the time of the trial of this cause. Proof that the plantation in controversy was worth less than the amount of plaintiffs' claim and the claim of the intervenor does not establish the allegation that the defendant was notoriously insolvent. He lived in Mississippi, and might have in that State ample means to pay all his debts. We cannot presume that the plaintiffs and defendant are guilty of fraud and collusion in the absence of proof to sustain that charge.

The District Judge refused to permit the intervenor to offer proof of the irregularity of the affidavit, the insufficiency of the attachment bond and other informalities in the proceedings. He permitted the plaintiffs to offer in evidence their acknowledged account against the defendant, and when the intervenor objected thereto because the necessary revenue stamp was not attached to said acknowledged account, the District Judge permitted the attorney of plaintiffs to affix thereto a five cent United States revenue stamp, and file the same in evidence. To all of which rulings the intervenor took a bill of exceptions.

We think the District Judge did not err in his rulings and the bill of exceptions was not well taken.

In the absence of fraud and collusion, the intervenor will not be permitted to urge defenses which are personal to the defendant. Questions of the admissibility of the testimony and the formality and regularity of the pleadings are matters for the consideration of the defendant, and if he saw fit to waive them no other party can complain.

In the case of *Lee et al. v. Bradlee*, 8 M. 55, where a third party intervened in the attachment suit claiming the property, this court said: "A third party has stepped in, averring the goods attached to be his property, and demanding restoration of them. The claimant has not only attempted to prove the property to be his, but he has been acting the part of the defendant by undertaking to show that the attachment ought not to have issued, and that after it had issued, it was imperfectly executed. The only thing which we conceive a claimant may be permitted to do is to show that the property attached is verily his. As soon as he succeeds in that, his part is at an end. But a claimant

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has surely no right to show any irregularity in the suit in which he intervenes for the sole purpose of rescuing the property. Whether the plaintiff, the court and the sheriff have been acting legally or not is none of his business."

The only difference between this case and the one just referred to is, in that case the intervenor claimed to be the owner of the property attached, while in this the intervenor claims that he has a mortgage on the property attached. The principle is the same. The same doctrine is affirmed in the case of *West v. His Creditors*, 8 Rob. 123, in which this court said "an intervenor who claims property in controversy between other parties cannot contest the plaintiff's claim against the defendant nor urge any irregularities in the suit."

In the case of *Yeatman v. Estill*, 13 An. 222, it was held that "it is no longer competent for the intervening party to object to the mode in which the writ of attachment has been executed." The intervenor admits that plaintiffs' attachment was levied prior to the registry of his mortgage. Without inscription his mortgage had no effect against third persons. C. C. 3314. As to plaintiffs, the property of the defendant stood free of encumbrance the day their attachment was levied because the intervenor had not inscribed his mortgage. Plaintiffs acquired attaching creditors' privilege on the plantation reverting from the judgment to the day the attachment was levied. C. P. 264, 265; 7 A. 1; 3 A. 430.

It is therefore ordered that the judgment appealed from be affirmed with costs.

NO. 2042.—DENNIS LONG v. SUCCESSION AND HEIRS OF JOHN F. SCOTT, deceased.

Where the plea of prescription is filed in the Supreme Court, and the record shows that the obligation on which the judgment of the lower court is founded is prescribed, and the appellee does not ask that the case be remanded to enable the holder to show an interruption, the plea will be maintained in the Supreme Court.

A PPEAL from Thirteenth District Court, parish of Tensas, *Hough, J. Aroni & Collier*, for plaintiff, *Leach & Lewis*, for defendants and appellants.

WYLY, J. The defendants have appealed from a judgment by default made final in open court against them in favor of plaintiff for the amount of a note made by John F. Scott, deceased.

They have filed in this court the plea of prescription of five years against the note sued on, and they pray that the judgment appealed from be avoided and annulled.

The note upon which plaintiff bases this action matured the fifteenth February, 1861, and more than five years elapsed from the maturity to the service of citation on the defendants. There is no evidence in the record showing the suspension or interruption of prescription, and from the face of the papers there is no doubt that it accrued before this suit

Dennis Long v. Succession and Heirs of John F. Scott, deceased.

was instituted. Plaintiff has not asked that this case be remanded to prove an interruption or suspension of prescription. The plea must prevail. C. C. 3505.

It is therefore ordered that the judgment appealed from be avoided and annulled, and it is now ordered that there be judgment in favor of defendants, dismissing this suit at plaintiffs' costs in both courts.

No. 2040.—BANK OF LOUISIANA v. D. P. WILLIAMS and Wife.

An engagement by one party to pay a certain amount of money to another at a given time, secured by mortgage on real estate, falls under the class or denomination of promissory notes, and is prescribed by the lapse of five years from maturity.

APPEAL from the Thirteenth District Court, parish of Concordia.
Hough, J. Mellen, for plaintiffs and appellants. *Mayo & Spencer*, for defendants.

HOWELL, J. The plaintiffs have appealed from a judgment sustaining the plea of prescription of five years to the following instrument, as a non-negotiable promissory note, to wit:

"STATE OF LOUISIANA—PARISH OF CONCORDIA.

"We, the undersigned, David Percy Williams and Mistress Elizabeth Matilda Gillespie, his wife, of the parish of Concordia, State of Louisiana, acknowledge ourselves jointly and severally indebted unto the 'President, directors and company of the Bank of Louisiana,' in the full sum of thirty thousand dollars (\$30,000), being for a loan of money this day made to us by the said corporation, the amount of which we confess to have received. Which said sum of thirty thousand dollars we do, for ourselves, our heirs, executors and administrators, bind ourselves jointly and severally to the said president, directors and company of the Bank of Louisiana, punctually to pay in one year from this date, and to comply with all the conditions of the mortgage this day made by us, and also with the obligations of the charter of the said bank.

"In testimony whereof we hereto subscribe our names, on this twenty-eighth day of April, A. D. eighteen hundred and fifty-seven.

"DAVID PERCY WILLIAMS,

"ELIZABETH MATILDA GILLESPIE.

"Witnesses:

"W. R. C. VERNON,

"A. G. TYLER.

"by HENRY BASIL SHAW, Attorney."

(Paraphed) "*Ne variatur.*"

"CHAS. S. FRENCH, Notary Public.

"VIDALIA, April 23, 1857."

By law, "all promissory notes, whether the same be negotiable or otherwise, shall be prescribed in five years." C. C. art. 3505; Act 1852, p. 90, § 3.

More than five years having elapsed between the maturity of the

above instrument and the institution of this suit, without any legal interruption of the prescription pleaded being shown, the inquiry presented is, whether or not said instrument is, in contemplation of law, a promissory note. The plaintiffs contend that it is a bond and prescribed in ten years.

Without going into an investigation of the nature and classes of bonds existing at common law, it is sufficient to say that, in our law, bonds seem to be written obligations, which are dependent on some contingency, and are specially provided for; while the instrument in suit possesses all the essential attributes of a promissory note, which are, in no legal sense, affected by any other stipulations or recitals embodied in it.

A promissory note is defined to be "a written engagement by one person to pay another person, therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story on Notes § 1; Byles on Bills, p. 3. "It must contain a legal promise for the *certain* payment of a certain sum, and the maker and the payee must be designated with sufficient certainty. * * * If to a receipt for money, the words 'to be returned when called for' are added; if the signer of an instrument acknowledges in it that a certain sum of money is borrowed on the promise of payment thereof; or that a certain sum was received of A to be repaid on demand with interest, such instruments are held to be promissory notes. * * * A note need not contain the words 'promise to pay,' if there are other words of equivalent import." Parsons on Notes, vol. 1, pp. 33, 34.

In the document before us the signers bind themselves to pay, in one year from its date, to the president, directors and company of the Bank of Louisiana, the sum of thirty thousand dollars, money loaned to and received by them.

The further stipulations, "to comply with the conditions of the mortgage and also with the obligations of the charter of said bank," impose no condition and propose no contingency on which payment is to depend, but recognize accessory obligations contracted or enacted for the security of the payment, and their omission would not have impaired the obligation to pay the money.

The instrument sued on being an unconditional engagement to pay a certain sum of money, cannot be classed among the personal actions which by the Code are prescribed in ten years; nor is it a mortgage, but the written evidence of a debt secured by a mortgage executed before a notary public.

We conclude that the judge *a quo* did not err in applying the prescription of five years.

Judgment affirmed.

The State, ex rel. D'Meza et al. v. The Judge of the Fourth District Court, Parish of Orleans.

**No. 1999.—THE STATE, ex rel. D'MEZA et al. v. THE JUDGE OF THE
FOURTH DISTRICT COURT, PARISH OF ORLEANS.**

Under the rules laid down in the Code of Practice the Supreme Court of Louisiana will not take general superintending control over the inferior jurisdictions. 3 M. 42; 2 La. 88; 19 La. 478; 8 An. 92. The writ of prohibition, the power to grant which is specially allowed by the Code of Practice to appellate courts of competent jurisdiction is not a writ of right, and is within the sound discretion of the tribunal to which the application is made.

The writ of prohibition will not be granted by the Supreme Court of Louisiana against a tribunal of inferior jurisdiction unless it be in cases where its intervention is necessary for the maintenance of its appellate jurisdiction.

APPPLICATION for writ of prohibition. *A. M. Vaorhies, Hays & New, A. Pitot*, for relators, *Judge Theard*, in personam.

HOWE, J. The relator avers that, on the twenty-first December, 1867, by a decree of the Fourth District Court of New Orleans, the Citizens' Mutual Insurance Company of New Orleans, a corporation doing business in the city of New Orleans under a charter duly passed and adopted under the laws of the State of Louisiana, was forced into "involuntary insolvency," and Henry Bezow was appointed by the Judge of said Fourth District Court commissioner of the insolvent corporation; that subsequently Henry Bezow filed in the Fourth District Court a suit against the relators for damages due to him in his capacity of commissioner, amounting to the sum of \$429,235 95; that the relators filed an exception to the jurisdiction of the Fourth District Court, averring "that the court from which the said Henry Bezow claims to have received his appointment was at the time of said pretended appointment without jurisdiction in the matter, and that said jurisdiction belonged, and belongs, exclusively and properly to the courts of the United States, under the law generally known as the bankrupt law, approved March 2, 1867;" but that said District Judge overruled the said plea, and has since proceeded to take further action in the premises. They insist that the laws of Louisiana on the subject of forced and voluntary insolvency have been virtually repealed by the act of Congress of March 2, 1867, that the Fourth District Court has exceeded and does exceed the bounds of its jurisdiction by decreeing the forced surrender of the Citizens' Mutual Insurance Company, and by proceeding with the liquidation thereof in violation of the laws and constitution of the United States.

They pray for a writ of prohibition to restrain the Judge of the Fourth District Court within the bounds of his jurisdiction, and prohibiting him "to further proceed in the said cause, involving the forced surrender of the Citizens' Mutual Insurance Company, the forfeiture of its charter, and the liquidation of its affairs, under the insolvent laws of the State of Louisiana."

The answer of the judge avers his competency to proceed in the cause, and sets forth the reasons why he believes himself to have had jurisdiction both to appoint the commissioner and to entertain the suit brought by the commissioner against the relators.

It is by no means clear that the relators have ever excepted to the jurisdiction of the Fourth District Court in the proceedings for a

The State, ex rel. D'Meza et al. v. The Judge of the Fourth District Court, Parish of Orleans.

declaration of forfeiture of the charter of the Citizens' Insurance Company and the appointment of a commissioner. The only exception we find in the record is filed in another and distinct proceeding, namely: a personal action, *ex delicto*, instituted by the commissioner against the relators; and, though this exception is called an exception to the jurisdiction, it is strictly an exception to the *capacity* of the plaintiff. It is difficult, therefore, to perceive how the judge of the Fourth District Court exceeded his jurisdiction in deciding that the plaintiff had been properly appointed in a previous and distinct proceeding. It can hardly be that the relators had a right to call upon the judge to decide whether or not the plaintiff had capacity to sue, and then, because he decided that question adversely to their wishes, to denominate his action a usurpation of jurisdiction.

But waiving this point, and granting that the exception we have quoted raises the question of *jurisdiction* in the case in which it was filed, and viewing the case from the standpoint assumed in the argument by both the relators and respondent, the question presents itself at once whether the writ of prohibition is the proper remedy in a case like this. It is not pretended by relators that they are in the situation of the petitioner in the case of *Clarke v. Rosenda*, 5 Rob. 27, where an order of seizure and sale had been issued and the petitioner was unable to give security for a suspensive appeal, and a devolutive appeal would have been an inadequate remedy, and a prohibition was asked, directed to the sheriff and the seizing creditor, on the ground that the petitioner was the assignee in bankruptcy of the property about to be sold.

It will not be contended that under the Constitution we have anything but appellate jurisdiction of such cases as that of *Bezow v. D'Meza* and others, and it is neither averred nor proved that our appellate jurisdiction is in any wise put in jeopardy by the Judge of the Fourth District Court. It is not evident that he will ever give a final judgment against the relators, or that if he shall give a final judgment that he will refuse to grant an appeal therefrom.

Among the first judgments pronounced by this court, *Laverty v. Duplessis*, 3 M. 42, was one disclaiming a general superintending control over the inferior jurisdictions.

In *Winn v. Scott*, 2 La. 88, decided under the present Code of Practice, the court declared that while the expressions of that code upon the subject of mandamus seem to embrace all possible cases, "the authority there granted must be considered in relation to the Constitution, which allows to this court appellate jurisdiction only, and its mandates should be confined to matters which have a tendency to aid that jurisdiction."

In the *State v. Bermudez*, 19 La. 478, this doctrine was reaffirmed.

In *State v. Judge*, 19 La. 183, this court said:

"The writ of prohibition, the power to grant which is specially allowed by the Code of Practice to appellate courts of competent jurisdiction, is not a writ of right; it is within the sound discretion of the tribunal to which the application is made; and the party who resorts to

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it is bound to establish such facts as to convince the appellate court that the remedy applied for is necessary, not only for the protection of the legal rights of the party, but also and principally for the constitutional exercise of our appellate jurisdiction. We understand, therefore, that the authority thus granted, being considered in relation to the Constitution, which allows this court appellate jurisdiction only, is to be confined to matters which have a tendency to aid that jurisdiction."

In *State v. Judge*, 8 An. 92, the court said:

"It is abundantly settled that this court disclaims any general superintending control over the district courts, and limits its summary actions to those cases where its interposition is necessary for the maintenance of its appellate jurisdiction."

In *State v. Judge*, 11 A. 696, where the relator averred that he had excepted to the jurisdiction of the court below, and that his exception had been improperly overruled and asked for a writ of prohibition, the court said:

"In cases in which a party has an adequate remedy by appeal this court will not listen for a moment to an application for a writ of prohibition or mandamus. We think the relator will, if injured by the overruling of his plea, have an adequate remedy by appeal from such final judgment as may hereafter be rendered against him in the case."

In the case at bar, we are of opinion that if a final judgment shall ever be rendered against the relators they will have an adequate remedy by appeal. The writ they ask for is not one of right, and the case does not show a legal necessity for such a summary remedy. In this view it is unnecessary to consider the other questions in the case.

For the reasons given it is ordered that the rule taken by the relators be dismissed with costs.

No. 1939.—*STATE, ex. rel. PIKE, LAPEYRE & BROTHER v. THE JUDGE OF THE FOURTH DISTRICT COURT.*

APPPLICATION for a writ of prohibition.

Howe, J. The facts of this case are substantially the same as those in the case of *State, ex. rel. D'Meza and others v. Judge of the Fourth District Court*; and, as in that case, we perceive no legal necessity for the writ which is asked for.

For the reasons given in the case of *D'Meza*, it is ordered that the rule taken by relators herein be dismissed with costs.

Bartley, Johnson & Co., Appellees, v. Succession and Heirs of Bosworth, Appellants.

No. 1233.—BARTLEY, JOHNSON & Co., Appellees, v. SUCCESSION and HEIRS OF BOSWORTH, Appellants.

The plea of prescription will not be defeated for any cause not mentioned in the exceptions established by law.

The maxim *contra non valentem agere non currit prescriptio*, forms no part of our written law, and cannot be invoked to defeat the plea of prescription. *Smith v. Stewart*. (Ante page 67.)

APPEAL from the Thirteenth Judicial District Court, parish of Carroll, *Farrar, J. Sparrow & Montgomery*, counsel for plaintiffs and appellees.

WYLY, J. This suit was instituted under the act of 1853, to revive an order of seizure and sale and a judgment rendered against Felix Bosworth prior to 1853.

The defense is the plea of prescription, more than ten years having elapsed from the promulgation of the act of 1853, to the institution of this suit. There was judgment in favor of plaintiffs ordering the revival of the judgments and the defendant has appealed.

The act approved thirtieth of April, 1853, provides that "all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgment; *provided, however*, that any party interested in any judgment may have the same revived at any time before it is prescribed, by having a citation issued according to law, to the defendant or his representative, from the court which rendered the judgment." • • • Acts of 1853, p. 250.

There was no citation issued nor steps taken to revive these judgments within ten years as provided by said act, and in 1863 the prescription of ten years accrued. Plaintiffs have endeavored to avoid the plea of prescription by invoking the maxim *contra non valentem agere non currit prescriptio*. They have introduced evidence to show that they could not institute suit during the war in the parish of Carroll, because the records were removed, and the parish site was occupied by the rebels; that plaintiffs lived in New Orleans and were prohibited by military orders from going into rebel lines during the war.

We have no authority to disregard the written law declaring that all judgments shall be prescribed by the lapse of ten years, and apply to this case the maxim *contra non valentem agere non currit prescriptio*, which forms no part of our written law. We had occasion to review this maxim and the authority of the courts of this State to apply it, in the case of *Smith v. Stewart*, lately decided; and for the reasons therein assigned, we are of opinion that the plea of prescription must prevail in this case.

It is therefore ordered that the judgment appealed from be reversed and annulled, and it is now ordered that plaintiffs' demand be dismissed at their costs in both courts.

Lewis E. Stowers v. Succession of D. F. Blackburn and C. A. Blackburn.

No. 2041.—LEWIS E. STOWERS *v.* Succession of D. F. BLACKBURN and C. A. BLACKBURN.

Solidarity is never presumed; it exists, if all, when several persons bind themselves towards another for the same sum, at the same time and in the same contract.
The acknowledgment and promise to pay by a tutrix in her individual capacity will not interrupt prescription as to the succession. 15 An, 168.

APPEAL from the Thirteenth Judicial District Court, parish of Carroll, *Farrar, J. Sparrow & Montgomery*, counsel for appellants.

HOWELL, J. This is an appeal from a judgment rendered on default against the succession of D. F. Blackburn, deceased, and Mrs. C. A. Blackburn, *in solido*, for \$10,000 with eight per cent. interest from first of January, 1860, on the following note:

"\$10,000. On the first (1st) day of January (1861) eighteen hundred and sixty one, we, or either of us promise to pay L. E. Stowers, Ten Thousand Dollars, with ten per cent. interest from the first day of January next for, money loaned.

"D. F. BLACKBURN,
"C. A. BLACKBURN.

"December 19, 1859.

"On the first day of January, 1862, I promise to pay L. E. Stowers the above sum, Eleven Thousand Dollars, with ten per cent interest.

"C. A. BLACKBURN.

"(Endorsed), Lake Providence, La., December 13, 1865. I acknowledge the within note to be correct.

"C. A. BLACKBURN."

Service was accepted as follows:

"I acknowledge service of the foregoing petition and note sued on and citation, as executrix and in my individual capacity, this September 11, 1867.

"C. A. BLACKBURN."

The prescription of five years is pleaded in this court and is urged only on behalf of the succession, on the theory that the acknowledgment made on the thirteenth of December, 1865, was made by Mrs. Blackburn *individually*, and the suggestion that she has gone into bankruptcy.

Both parties admit that the promise, written at the foot of the note, was the individual assumpsit by the *widow* of the note sued on, although for a different sum and payable at a different date, and the question is, whether or not the acknowledgment on the thirteenth of December, 1865, interrupted prescription as to the succession, represented by Mrs. Blackburn as executrix. To sustain the affirmative, it must be held, both that the obligation sued on is not a solidary one, and that Mrs. Blackburn did not make said acknowledgment as executrix.

NOTE.—It is not shown that she was bound *in solido* as maker of the note and hence her liability for the debt can rest solely on her subse-

Lewis E. Stowers v. Succession of D. F. Blackburn and C. A. Blackburn.

quent promise to pay. But it is contended, and we think successfully, that this promise does not create the solidarity contemplated by the Code, in determining the effect of an acknowledgment by one of the co-debtors *in solido*. Solidarity exists, by the Code, when several persons bind themselves towards another for the same sum, at the same time and in the same contract. It cannot be presumed. There being no priority nor reciprocity between the promissers, nor express stipulation of solidarity in this case, the defendants are not debtors *in solido*, and consequently the acknowledgment of thirteenth of December, 1865, if made by Mrs. Blackburn individually, did not interrupt prescription as to the succession. C. C. 2072, 2077, 2086-7-8, 2092, 3517; 12 R. 183; 15 A. 168. It is unnecessary to decide whether or not the executrix could create a solidary obligation against the succession.

Second.—The question whether she made the acknowledgment as executrix is one of inference, and upon the pleadings and evidence before us, is one of considerable doubt.

As the plaintiff might have adduced evidence on this point or otherwise shown an interruption of prescription, if the plea had been filed in the lower court, we think the ends of justice will be subserved by remanding the cause as requested by the appellee.

We cannot disturb the judgment as to Mrs. Blackburn, as upon the admission of counsel she is in bankruptcy.

It is therefore ordered that the judgment of the District Court against the succession of D. F. Blackburn, deceased, be reversed, and the cause as to said succession be remanded upon the question of prescription; costs of appeal to be paid by appellee.

Mr. Justice Wyly recused.

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NO. 2004.—CITIZENS' BANK OF LOUISIANA v. HENRY JOHNSON and WIDOW W. J. BOGAN.

A certificate of stock of a corporation or banking company, pledged by the owner to the company to secure the payment of a note and mortgage to the bank for money loaned, operates as a standing acknowledgment of the debt, and prescription does not run against the note while the stock is pledged.

APPEAL from Fifth District Court, Parish of Iberville. *Posey, J. Rousseau & Estavan*, for Citizens' Bank. *F. H. Farrar*, for Johnson, executor.

LUDELING, C. J. On the twenty-seventh day of December, 1867, the Citizens' Bank of Louisiana obtained an order of seizure and sale, under an act importing confession of judgment, and containing the fact *de non alienando*, against the property mortgaged, which was in the possession of Mrs. W. J. Bogan. Under a writ, issued in the case, the sheriff seized the property described in the writ, and was proceeding to sell the same, when he was restrained by an injunction obtained by Joseph Johnson, testamentary executor of Henry Johnson.

Citizens' Bank of Louisiana v. Henry Johnson and Widow W. J. Bogan.

The injunction was granted on the allegation that the notes or obligations, secured by the mortgage, were extinguished by prescription—more than five years having elapsed since their maturity.

The Citizens' Bank prayed for the dismissal of the injunction for the following reasons, to wit:

"Because the stock-notes of Henry Johnson are not prescribed, the same being subject to annual payments, up to the expiration of the charter.

"Because prescription did not run during the war.

"Because the original debt of Henry Johnson has been assumed by the subsequent purchasers, and late actual possessor, sued in this case, does not plead prescription."

There was judgment in favor of the Citizens' Bank of Louisiana, dissolving the injunction. From this judgment Joseph Johnson, executor, has appealed.

In accordance with one of the stipulations in the eleventh section of the charter of the bank, the annual payments necessary to a renewal of the notes were made up to the first day of February, 1860—since which period no payment has been made—and consequently the payment of the notes has been exigible since the first February, 1860. Section 11 of charter, acts of 1833, p. 181. More than five years having elapsed since the last payment, before the bank instituted proceedings under their mortgage, the claim would be barred by prescription if there had been no interruption thereof.

The notes or obligations, which form the basis of this suit, were executed by Henry Johnson, a stockholder in the Citizens' Bank of Louisiana, in pursuance with the terms of the eleventh section of the charter of the bank, which declares "that every stockholder in said corporation, on depositing and pledging his certificate of stock, shall be entitled to a credit equal to one-half of the total amount of his stock; provided, that in proportion as such stockholder shall use the credit, he shall give his notes or obligations to said corporation for the amount so lent him, and shall pay interest thereon annually and in advance." Acts of 1833, p. 181.

The notes or obligations are in the words following:

"Be it known that I am well and truly indebted unto the Citizens' Bank of Louisiana, for value received, in the sum of eight thousand three hundred and eighty-eight dollars, *being the amount of my credit as a stockholder* of two hundred and forty-four shares of said institution; which sum I will pay at the banking house of New Orleans, on the *first day of August, 1851, fixed, or renew*, according to the provisions of the charter of said bank. *The payment of the aforesaid sum of money is secured by a deed of mortgage and pledge, passed by myself and wife, before Adolphe Boudousquie, notary public in and for this city and parish of Orleans, under date of this day.*

"H. JOHNSON.

"New Orleans, March 1, 1851."

Citizens' Bank of Louisiana v. Henry Johnson and Widow W. J. Bogan.

The other note is for \$4550, and was payable first February, 1852. In other respects it is similar to the one copied above.

The notarial act, referred to in the notes, contains this declaration: "And in order to secure furthermore unto the Citizens' Bank of Louisiana the payment of the sum of twelve thousand nine hundred and thirty-eight dollars, amount of the said stock notes, and also the payment of the eventual interest above stipulated, the said Henry Johnson does hereby *pledge and pawn*, in favor of said bank, *the aforesaid three hundred and seventy-four shares.*"

It is apparent that the condition on which Henry Johnson, deceased, borrowed the money from the bank, was that he should deposit and pledge his stock in the Citizens' Bank of Louisiana to secure the payment of his loan; and the notes and the notarial act signed by Henry Johnson establish the fact that this pawn and pledge was made by him. Whilst this pledge remained in the possession of the bank, prescription against the notes and obligations the pledge was intended to secure was interrupted, because it was a standing acknowledgment of indebtedness on the part of Johnson. "Prescription is interrupted, and ceases to run, whenever the debtor or possessor acknowledges the debt, or the adverse right against which it was running. C. C. art. 3486. This acknowledgment may be express or implied. In this case it is of the latter character." 1 R. 556, *Wilson v. Banner*; 8 R. 145, *Montgomery et al. v. Levistone*.

En general la reconnaissance du droit soumis a la prescription n'opere l'interruption que pour le passe, et permet a une prescription nouvelle de recommencer a l'instant meme. Mais, il en peut etre quelquefois autrement. Ainsi, quand un debiteur donne un gage a son creancier pour surete de la creance, ce n'est pas seulement pour le temps anterieur que la prescription est interrompu; elle continuerra de l'etre tant que le creancier restra nanti du gage, puis-qu'en le lui laissant dans le mains, le debiteur ou ses heritiers renouvellent constamment la reconnaissance tacit de la dette." *Marcade Prescription*, p. 146. *Trelong*, No. 618; *Duranton*, No. 269.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, and that the appellant pay the costs of this appeal.

No. 2015.—A. LEDOUX v. JOHN R. BUHLER.

A promise to pay, subsequent to the maturity of the obligation, may be set up by an amended petition.

Where a debt existed between two parties who liquidated the same by note, at a time and under circumstances rendering the execution of the note illegal on account of one party residing within the Confederate and the other within the Federal military lines, during the late war, and the debtor promised to pay the debt after the war had ceased, with a full knowledge of the nature and origin of the obligation, the promise can be enforced and the debtor compelled to pay the obligation.

APPEAL from the Fifth District Court, parish of West Baton Rouge, *Posey, J. Farrot & Lamon* for appellant. *Barrow & Pope* for appellee.

A. Ledoux v. John B. Buhler.

HOWELL, J. This is an action on a promissory note made by John Buhler on sixteenth May, 1862, at West Baton Rouge, for \$3,780, payable to the order of Menard & Vignaud, twelve months after date, at their office in New Orleans, with eight per cent. interest after due. The defendant, who accepted, purely and simply, the estate of his deceased father, John Buhler, filed a peremptory exception, alleging that at the date of executing the said note the maker resided within the Confederate military lines and the payers within the Federal military lines, and consequently the contract was null, being in violation of law prohibiting all commercial intercourse or transactions between said parties, of which facts the plaintiff had notice.

The plaintiff then filed an amended answer, declaring that said note had been given in renewal of an obligation existing as far back as 1859, originally for \$5,000, several times renewed and reduced by payments to the amount of the note sued on, and that in 1866 the defendant acknowledged the correctness and validity of said obligation and promised to pay the same.

The defendant excepted to the filing of this amended petition for the reasons that it would change plaintiff's ground of action, that the original obligation was novated and that the promise of defendant was in view of a compromise, which was properly overruled. The substance of plaintiff's demand was not changed by allegations of the amended petition. They simply set forth the origin of the obligation, and the alleged promise to pay is not inconsistent with the original demand, and can properly be set up by amendment. The questions of novation and compromise depend on evidence and cannot, in this instance, be a ground of exception to any inquiry into the facts alleged.

The District Judge sustained the peremptory exception and dismissed plaintiff's suit, who has appealed.

The only question which we deem it necessary to examine is that of defendant's acknowledgment. He contends that it was made in view of a compromise and without a knowledge of the nature of the obligation, which being absolutely void is not capable of being made valid.

The acknowledgment and promise are shown to have been unconditional. The only point of difference was as to the time when a confession of judgment should be made. The note itself was notice to the defendant of the circumstances, which in law, would affect its validity, and it is apparent that he must have made the acknowledgment and promise with a full knowledge of the origin and nature of the obligation, which we must hold to be such as to form a legal basis for a new promise to pay the debt evidenced by the note sued on. The obligation existed before the war, and although the note was executed between parties not competent at the time to contract, the debt was not thereby extinguished and the subsequent promise to pay it, as evidenced by said note, having a moral obligation as its basis, can be enforced in a suit thereon, which may be taken as the evidence of the debt agreed on by the parties.

A. Ledoux v. John R. Buhler.

The judge *a quo* erred in dismissing plaintiff's suit on the peremptory exception, which is really a defense to the action, and as there is evidence in the record on the merits to establish the claim, we must sustain it.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff recover of the defendant, John R. Buhler, the sum of three thousand seven hundred and eighty dollars, with eight per cent. interest from the sixteenth day of May, 1863, and costs in both courts.

Rehearing refused.

No. 2024.—BRIDGET GRADY, Administratrix v. LOUIS DESOBRY, SR.,
et als.

The State Engineer having made a contract in conformity with the Act of 1857, p. 162, for improving and draining Bayou Bourbieux, which lies in the parishes of West Baton Rouge and Iberville, is a competent witness to testify as to the performance of the work in accordance with the contract.

The fact that the engineer is required by the contract to make a report to the Police Jury of the completion of the work does not disqualify him from testifying to other facts not embraced in his report.

APPEAL from the Fifth District Court, parish of Iberville, *Posey*, J. A. Talbot, for plaintiff and appellee. *Barrow & Pope* and *W. B. Robertson* and *Oscar Lauve* for defendants and appellants.

HOWELL, J. This is a suit on a joint contract between the defendants and plaintiff's husband for the improvement of the drainage of Bayou Bourbieux, in the parishes of Iberville and West Baton Rouge, and in which the former parties bound themselves to pay to the latter the total sum of fifteen thousand dollars during the progress and on the completion of said work, which was to be performed according to the specifications in said contract.

The parties first cited excepted to the petition on the ground that the contract sued on, being a joint contract, was not complete and binding, as one of the contracting parties had not signed and another signed conditionally, and the condition was not accepted by the others.

By an amended petition accompanied by the original contract, the party alleged not to have signed, was made a party to the suit upon the averment that he was a party to said original contract, which was proven, and the only question on the exceptions is whether or not the condition annexed to the name of one J. A. Levique, in the following words: "*a condition que je sois egoute,*" was accepted.

On the trial of the exceptions, a contract between the State Engineer and these defendants was introduced, by which the latter had agreed to do the work of improving the Bayou Bourbieux, as authorized by Act of 1857, p. 162, and for a sum to be collected by the engineer from the owners of the lands drained, and paid to defendants as the work

Bridget Grady, Administratrix, v. Louis Desobry, Sr., et als.

progressed. . By the contract stied on this same work was to be done by plaintiff's husband for the defendants. The engineer testifies that, at the date of giving his testimony, he had not paid the defendants *in full* the amount coming to them, as per contract between him and them; that it was not the main reason, in entering into contract with them, that they had an interest in the improvement of the bayou; the main reason was that they were the *lowest bidders* to do the work; that the land of Lavique was embraced in the survey required to be made, and was drained by said bayou. The above statute authorized the engineer to let out said work by contract, which should be binding on all the proprietors of the lands the same as if they had personally bound themselves in said contract. Under this state of facts and the law we must infer the "acceptance" and fulfillment of the condition, if such acceptance was essential. The defendants had bound themselves, as contractors with the State Engineer, to do the work or cause it to be done, without reference to any benefit to their own lands; they had evidently received a part of the price from the engineer; and the land of Lavique was drained according to the condition. We cannot see any legal objection to the testimony of the engineer as to the benefit to Lavique's land. The objection that the "survey" is the best evidence might possibly be good in a suit against Lavique for the assessment upon him as a proprietor of the lands to be drained, but not on his contract to pay for the work in question.

On the merits, it is objected that the engineer could not prove, by parol, that the work was done in accordance with the contract, as the law required him to make a report thereof to the police juries of the two parishes. This report was for the purpose of placing the work after its completion under the control of the parish authorities, who were then to appoint commissioners to keep it in repair. The engineer had full control and supervision of the work as it progressed, and was by the law and the contracts the judge of its character and completion, and he could testify on the subject.

No objection is urged to the amounts found due by the judge *a quo*.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 2047.—LOUISIANA STATE BANK v. YELVERTON CAMMACK.

Where the certificate of the clerk shows that the record contains all the testimony adduced, documents filed and proceedings had, the appeal will not be dismissed because there is no bill of exceptions, statement of facts or assignment of errors. 20 An. 213; C. P. 601, 602. The plea of prescription will be noticed when made for the first time in the Supreme Court.

A PPEAL from the Thirteenth Judicial District Court, parish of Tensas, *Hough, J. Farrar & Reeres*, for plaintiff and appellee, *Collier & Clinton*, for defendant and appellant.

HOWE, J. The curator of the defendant's succession has appealed from a judgment against the defendant rendered upon a bill of exchange due April twenty-six, 1862, and founded on a citation of which service was made August 3, 1867, and has pleaded in this court the prescription of five years.

The appellee has moved to dismiss the appeal.

First.—"Because all the evidence adduced is not in the record, and the clerk who certifies the fact that the record contains all the evidence adduced was not clerk of the court when the case was sued and cannot certify any such fact; and

Second.—"Because the record contains no note of evidence, statement of facts, bill of exceptions nor assignment of errors of law upon the face of the record, whereby this court can review the decision appealed from."

As to the ground first quoted, the certificate of the clerk appears to be regular, and we find nothing in the record, of which this court can take notice, to show that the certificate is untrue or that the clerk had no power to make it.

The second ground for the dismissal of the appeal cannot prevail. The record is certified to contain all the testimony adduced, documents filed and proceedings had, and the deposition of the only witness appears to have been taken in writing. No statement of facts could therefore be required. C. P. 601, 602, 896; 20 An. 213. Nor is an assignment of error absolutely necessary in such case. 14 L. 371. And in this case we see no necessity of a bill of exceptions. The appellant comes before us with a plea which is permitted by law and which we must consider. By article 902 of the Code of Practice it is provided that although in general parties before the Supreme Court are not allowed to plead other matters than those which were before the inferior court, nevertheless it may depart from this rule when the exception taken is one of those which may be pleaded at any period of a cause, and the proof of it appears by the mere examination of the record. Thus prescription may be pleaded before the Supreme Court, when the proof of it appears on the face of the proceedings in the lower court. These proceedings have been correctly reported to us—so declares the certificate of the clerk. The right to plead prescription here and the validity of the plea do not necessarily depend on a note of evidence, a bill of exceptions or an assignment of error. If from a "mere examination of the record" regularly certified to us we find that the debt sought to be enforced is prescribed, we must decline to dismiss an appeal which had been taken, in regular form, and sustain the plea of prescription.

In this case we find from a mere examination of the record that the debt sued on was prescribed by the lapse of more than five years between the maturity of the bill and the service of citation.

Louisiana State Bank v. Yelverton Cammack.

The appellee has not asked that the cause be remanded for trial on this plea. It is therefore ordered and adjudged that the judgment appealed from be reversed, and that there be judgment in favor of Robert Murdock, curator of the succession of Yelverton Cammack, deceased, with costs in both courts.

Rehearing refused.

No. 1563.—SAMUEL SMITH & Co. v. J. H. MORRISON.

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Where an important document, such as a mortgage, has been inadvertently omitted from the record, the Supreme Court will, in the exercise of a sound legal discretion remand the case in order that both parties may have an opportunity to establish their rights.

A PPEAL from the Seventh Judicial District Court, parish of Pointe Coupee, *Cooley, J. Harrison & Hunton* and *Edward Philipps*, for plaintiffs and appellees, *C. E. Schmidt*, for defendant and appellant.

HOWELL, J. This suit was brought as a personal action on two promissory notes, and afterwards an amended petition was filed, alleging that they were given as part of the price of a plantation, and asking that a special mortgage and vendor's privilege, as shown by the *annexed act of sale and mortgage*, be recognized and enforced. Judgment was rendered on default and confirmed for the amount of the notes with mortgage and privilege as claimed.

The defendant has taken a devolutive appeal and he assigns as error that there is no evidence to establish the mortgage and privilege allowed.

The certificate of the clerk states that the record contains "a true and correct transcript of all the documents on file and proceedings had (*there being no testimony offered*) on the trial of the case, etc." At the instance of the plaintiffs' counsel a *certiorari* was issued for the purpose, and in answer thereto the clerk amended his certificate to read thus: "that the foregoing and within twenty-six pages do contain a true and correct transcript of all the documents on file, *evidence adduced* and proceedings had on the trial of the case, etc."

The notes paraphed, but not the act of sale and mortgage, alleged to be annexed to the amended petition, are in the record, and there is no minute of evidence.

The evidence to establish the mortgage and privilege set out and claimed is wanting; but the record satisfies us that the notarial act in question, if not produced in court on the trial, was in the possession or control of counsel, and in the exercise of an equitable discretion, vested in this court by art. 906 C. P., plaintiffs should, under the peculiar circumstances of this case, be allowed an opportunity to supply an apparently inadvertent omission. The facts that the notes are paraphed and that the judgment as drawn up and signed contains a description of

Samuel Smith & Co. v. J. H. Morrison.

the mortgaged property, as, it is alleged, is set forth in the act of sale annexed to the amended petition, render it probable that the said act was before the judge; but upon the record as certified we cannot affirm the judgment or dismiss the appeal. While we would not, even indirectly, encourage negligence in litigants or their counsel, we feel authorized to remand the case to give both parties an opportunity to establish their rights, in the belief that the ends of justice will thereby be subserved. See 13 L. 138; 15 L. 231; 8 R. 120; 9 R. 387; 12 R. 518; 2 A. 846; 9 A. 95; 10 A. 94; 4 R. 323; 4 A. 231.

It is therefore ordered that the judgment appealed from be reversed and the cause remanded for further proceedings according to law. Plaintiffs to pay costs of appeal.

No. 478.—SAMUEL SNODGRASS, Appellant, v. THOMAS A. ADAMS, Appellee.

A sale of imported goods at the port of New Orleans in 1861 and 1862, while the city and State was under the control of the insurgents, did not impose on the vendor the obligation of warranty against eviction for the non-payment of duties to the United States. Under such circumstances, the purchaser is presumed to have contracted with reference to the fact that the duties had not been paid.

The vendee cannot maintain an action against the vendor to rescind the sale of imported goods on the ground that the duties had not been paid to the United States, when it is shown that the port was under the control of the insurgents at the time.

A PPEAL from the Second District Court of New Orleans, *Howell, J.* *G. L. Bright*, Attorney for Appellant. *C. Roselius* and *A. Philipe*, attorneys for appellee.

WYLY, J. On the seventh February, 1862, plaintiff purchased from the defendant three hundred and seventy-five rolls of India bagging, which had been imported by the defendant from a foreign country in the Spanish ship *Montserrat*, that had arrived at the port of New Orleans on the twenty-seventh of May, 1861. The duties thereon were collected by Mr. F. Hatch, then acting as collector of customs at this port for the Confederate States, but he had been commissioned by the United States. Plaintiff afterwards sold all the lot of bagging, except one hundred and twenty rolls, containing fourteen thousand four hundred yards, which were taken possession of by the United States, when the Federal forces captured the city, and are detained for the duties claimed to be due thereon to the United States government. On the eighth of December, 1862, plaintiff being informed of this seizure, notified the defendant thereof and demanded the return of the bagging to him again free of all claims of the United States, or the amount paid by him for the one hundred and twenty rolls, to wit: \$3456, and the defendant refused to comply with the demand.

Plaintiff then instituted this suit for the rescission of the sale to the

Samuel Snodgrass, Appellant, v. Thomas A. Adams, Appellee.

extent of the one hundred and twenty rolls, and to recover the amount paid therefor by him as aforesaid.

Defendant answered, averring that when the cargo arrived at the customhouse on the twenty-seventh of May, 1861, it was regularly entered and the duties thereon duly paid; and having sold and delivered it to the plaintiff on the seventh of February, 1862, it remained thereafter at his risk.

On the trial in the lower court, there was judgment of non-suit, and plaintiff has appealed.

There is no dispute as to the facts. The question for us to determine is, whether the sale of the India bagging at the time imposed upon the defendant an obligation to warrant the purchaser against the payment of the import duties of the United States thereon.

Had the sale occurred under ordinary circumstances, whilst the Federal Government was in undisturbed administration of its revenue laws at the port of New Orleans, it would have imposed the obligation of warranty on the vendor to maintain the purchaser's peaceable possession of the thing sold against the claims of the Government for duties thereon, and against the claims of all other persons. Being in possession of a foreign fabric at this port, the defendant would have been presumed to have paid the duties to the Government, and the plaintiff who purchased it from him could have held him liable in warranty if evicted by the Government.

But on the seventh of February, 1862, when this sale was made, the vendor and the vendee knew that they were contracting in an insurrectionary district; that at the time and for twelve months previous the administration of the revenue laws of the United States had been obstructed, and the customhouse at this port was in possession of the so-called Confederate Government, which was collecting the duties.

The parties are presumed to have contracted in reference to the surrounding circumstances at the time. As the duties were not then being collected here by the United States on account of the rebellion, the plaintiff is presumed to have purchased the bagging at his own risk so far as the claims of the United States might extend for duties thereon. Under the circumstances, the contract of sale did not, in our opinion, create the obligation of warranty as against the United States.

Plaintiff bought the property in a rebellious State, at a time when the surrounding circumstances created the presumption that the duties had not been paid to the Federal Government—the parties evidently contracted in view of that fact.

We are of opinion that the District Judge did not err in rendering judgment of non-suit.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

Mr. Justice Howell recused.

Alcide Bouanchaud, Appellee, v. Charles D'Hebert, Appellant.

No. 2005.—ALCIDE BOUANCHAUD, Appellee, v. CHARLES D'HEBERT, Appellant.

Section 4 of the act of the Legislature, approved September 4, 1868, No. 51, making the clerks of District Courts *ex officio* clerks of the Parish Courts, is in conflict with Article 117 of the Constitution of 1868, which declares that "No person shall hold or exercise, at the same time, more than one office of trust or profit, except that of justice of the peace or notary public."

Section 9 of the same act conflicts with article 86 of the Constitution, which declares that the Parish Judges of the several parishes shall receive a salary and fees to be provided by law. The above numbered sections of the act No. 51, approved September 4, 1868, are unconstitutional and void. Constitution, arts. 86 and 117.

APPEAL from the Seventh District Court, Parish of Pointe Coupee. *Miller, J. Cooley & Philips*, for petitioner and appellee. *F. H. Farrar*, for defendant and appellant.

WYLY, J. Plaintiff, who is Judge of the Parish Court of the parish of Pointe Coupee, has enjoined the defendant, who is clerk of the District Court of said parish, from acting as clerk of the Parish Court, and from collecting the fees of that office, which, he contends, belongs to him under the provisions of the Constitution.

He avers that the claims and pretensions of the defendant to the office of Parish Clerk, and the fees and emoluments thereof are based upon an act of the Legislature approved September 4, 1868, which provides that the clerks of the several District Courts of this State shall be *ex officio* clerks of the Parish Courts, and which prohibits Parish Judges from receiving any fees; all of which, he contends, is contrary to and in violation of the Constitution of this State, which provides (article 86) that Parish Judges "shall receive a salary and fees, to be provided by law. Until otherwise provided, each Parish Judge shall receive a salary of one thousand two hundred dollars per annum, and such fees as are established by law for District Clerks."

He avers that, under this provision of the Constitution, he has the exclusive right to act as clerk of his own court and receive the fees thereof.

He further represents that said act is unconstitutional, because it authorizes and requires the clerk of the District Court to hold and exercise the office of clerk of the Parish Court, two separate offices of trust and profit, which is in violation of Article 117 of the Constitution.

The defendant denied generally the allegations of plaintiff; denied that the law making him *ex officio* clerk of the Parish Court is unconstitutional as alleged; and averred that plaintiff has no cause of action, and that he is estopped from pleading the unconstitutionality of said act, having drawn the additional salary stipulated therein.

There was judgment in favor of plaintiff perpetuating the injunction; and the defendant has appealed.

The facts are admitted. The only question presented for our consideration is, whether that part of the act of fourth September, 1868,

Aldo Botanchud, Appellee, v. Charles D'Hebert, Appellant.

which makes the clerk of the District Court *ex officio* the clerk of the Parish Court, and which declares that the Parish Judge shall have no fees of office, violates the provisions of the Constitution of 1868.

Article 117 of the Constitution declares that "No person shall hold or exercise, at the same time, more than one office of trust or profit, except that of justice of the peace or notary public."

The fourth section of the act approved September 4, 1868, provides "That the clerks of the several District Courts shall be *ex officio* clerks of the Parish Courts, and that the clerk or his regularly appointed and qualified deputy, shall always be in attendance on the Parish Court at all its terms and sittings." It also prescribes certain duties to the clerks and imposes a fine for failure to perform those duties.

We think this section clearly creates the office of Parish Clerk, and the words "*ex officio*" do not make it the less an office of trust. It is a separate office, and the designation of the District Clerk to fill it, is contrary to article 117 of the Constitution, and is, therefore, null and void.

Article 86 of the Constitution declares that "For each Parish Court one Judge shall be elected by the qualified electors of the parish. He shall hold his office for the term of two years. He shall receive a salary and fees, to be provided by law. Until otherwise provided, each Parish Judge shall receive a salary of one thousand two hundred dollars, and such fees as are established by law for clerks of the District Courts. He shall be a citizen of the United States and of this State."

The ninth section of said act of September 4, 1868, provides "That the Parish Judges shall have a salary, payable quarterly, on their own warrant on the State Treasurer, graduated as follows: in parishes having one member in the House of Representatives, two thousand dollars; in parishes having two or more members in the House of Representatives, two thousand five hundred dollars, and they shall have no fees of office."

From a careful consideration of the eighty-sixth article of the Constitution, we are of opinion that the Parish Judge is entitled to receive a salary and fees, to be provided by law; and until the Legislature establishes other fees, he is authorized to receive the same fees in cases in his court as the clerks of the District Courts are authorized by law to charge in like cases in the District Courts.

We think that part of the ninth section of said act which declares that Parish Judges "shall have no fees of office," is also unconstitutional and void.

The eighty-sixth article of the Constitution secures to plaintiff, who is admitted to be Parish Judge, both a salary and fees; and while it permits the Legislature to fix the amount of the salary and fees, it does not authorize them to deprive him of the one or the other. The Legislature had no more power to deprive him of fees than of a salary. It could not deprive him of either.

Alcide Bouanchaud, Appellee, v. Charles D'Hebert, Appellant.

The Constitution evidently permits Parish Judges to perform the judicial and ministerial duties of their offices, and to receive in compensation therefor both salaries and fees.

It is therefore ordered, that the judgment appealed from be affirmed with costs.

No. 1437.—MOSES MARX, Appellant, v. J. J. WHEELIS, Appellee.

By the statute law of Mississippi, all obligations, or notes or drafts for money, whether payable to order or not, are assignable by simple endorsement. Revised Code of Mississippi, page 353. Where the evidence shows that the drawer of a draft payable at a future day has notified the drawees not to pay it, he is not entitled to notice of dishonor. One party cannot hold another liable individually, on a contract made with him as agent. The transferee of drafts not negotiable occupies no better position than the original holder.

A PPEAL from Fifth District Court, Parish of Orleans. *Leaumont, J. Bonner, Goode & Dillingham*, for appellant. *Sheldon & Pardee*, for appellee.

WYLY, J. Plaintiff has instituted this suit against the defendant to recover the amount of two drafts or orders drawn by him on Levy & Dieter, which were not accepted. The drafts were not made payable to order or bearer, but to B. B. Fore, who transferred them to plaintiff by his endorsement in blank.

Defendant excepted to plaintiff's action, because the drafts, not being negotiable, could not be proceeded on in the name of plaintiff, because the petition does not show that the bills were duly presented to the drawees, were dishonored, and notice of dishonor served upon him. Without waiving the benefit of his exception, the defendant answered, averring that in October, 1865, as agent for the drawees, Levy & Dieter, he purchased from the payee of the bills, B. B. Fore, in the State of Mississippi, a plantation and personal property thereon for \$12,000, paying in cash \$7333 54; and for the balance drawing the time drafts sued on; also averring that at the time he purchased said plantation from said Fore, that one Allen B. C. Patrick, of Copiah county, Mississippi, held a vendor's lien and privilege on said lands, to secure the payment of a note made by said Fore for \$3780, and that said Fore promised to pay off and extinguish this lien and privilege held by said Patrick, so as to give the purchasers, Levy & Dieter, a full and unincumbered title to said plantation; also averring that when the drafts were given it was understood and agreed between the defendant and said Fore that they were not to be presented and paid until said vendor's lien in favor of Patrick was paid or extinguished by said Fore, and that he the "defendant immediately notified the said Levy & Dieter of the condition upon which said drafts were given, and said vendor's lien still existing upon said lands in favor of said Patrick; when the said drafts upon their face became due they were not accepted and paid by

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said Levy & Dieter." Defendant also averred that the said lien still exists on said lands, and it is for a sum exceeding the aggregate amounts of said drafts, and that said Patrick is proceeding by bill in chancery in the Circuit Court of Mississippi, to enforce the same.

On the trial there was judgment in favor of the defendant, dismissing this suit, and plaintiff has appealed.

The exception was not well taken; the endorsement by the payee to plaintiff was made in Mississippi, where the drafts were drawn, and the statutes of that State offered in evidence show that all obligations or notes, whether payable to order or not, may be assigned by simple endorsement. (See Revised Code of Mississippi, page 355.)

The second ground of exception is also untenable. The defendant in his answer admits that he notified the drawees, Levy & Dieter, for whom he purchased the property, of the conditions upon which the drafts were drawn, of the prior lien existing in favor of Patrick, and that when the drafts became due they were not accepted and paid. Under the circumstances the drawer was not entitled to notice of dishonor; he knew the drafts would not be paid; he had virtually notified the drawees not to pay them.

The defense on the merits seems to be more effectual.

The drafts not being negotiable, are liable, in the hands of the plaintiff, to any defense which the drawer might have against them if in the hands of the original payee. Plaintiff, the transferee of the instruments sued on, occupies no better position than B. B. Fore, the payee; and the defendant can set up failure of consideration, or any other defense he may have.

The payee, B. B. Fore, testifies that "there is a suit pending in Copiah county instituted by said Patrick against said lands, to enforce a vendor's lien, and I have failed to pay or extinguish the same."

F. Surgis, who acted as attorney for the parties and drew the drafts in this suit, testifies that "it was agreed between the parties that the drafts were to be accepted on presentation, and paid when due. That B. B. Fore was to arrange and settle the difficulty as to vendor's lien with Patrick prior to the maturity of the drafts, as stated in my direct examination."

After the purchase of the property, and after the drafts had been drawn, the defendant wrote to the witness, Surgis, stating that he thought it best to get an indemnifying bond against the Patrick lien. Surgis testifies that he "read the note to Fore, who said it was useless to give a bond, as he had friends attempting to settle the matter with Patrick, and he, Fore, thought they would do so long before the drafts would fall due."

The evidence is sufficient to satisfy us that the payee, Fore, promised the defendant, when he sold him the property, that he would pay off or extinguish the outstanding vendor's lien held by Patrick bearing on the land.

Moses Marx, Appellant, v. J. J. Wheelis, Appellee.

We are satisfied from the evidence that the drafts were given to Fore with the understanding that he was to settle this lien prior to the maturity of the drafts, and he has failed to comply with this important condition. Having failed to comply with the agreement, Fore could not recover from the defendant the amount of the drafts. Plaintiff, the transferee of those instruments which are not negotiable, occupies no better position, and he cannot recover thereon.

The evidence furthermore shows that Fore contracted with defendant as agent for Levy & Dieter; the contract which they signed showed that Levy & Dieter were purchasing the property through their agent, who drew the drafts filed in this suit on his principals in payment for the property bought for them, and that Fore must have been aware thereof. Having dealt with the defendant as agent, we do not see how the payee could have held him liable individually. The credit must have been given to the drawees, Levy & Dieter. 3 M. 644; 10 L. 390.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

NO. 2023.—J. TRASIMOND LANDRY v. WIDOW URSIN LANDRY.

An appeal taken by the defendant must be prosecuted within the time fixed in the order.

An appeal will not lie in favor of the intervening creditor after the time fixed by the order for the defendant to appeal has expired; in such a case the judgment becomes *res judicata*.

APPEAL from the Fifth District Court, parish of West Baton Rouge. *Posey, J. Favrot & Lamon*, for appellee, *Barrow & Pope*, for appellant.

LUDELING, C. J. On the fourth January, 1868, the plaintiff obtained a judgment against the defendant for \$7784 90, with eight per cent. interest per annum from April 1, 1860, till paid, subject to a credit of fifty dollars paid on eleventh November, 1865, with mortgage on the property, specially mortgaged to secure the debt. The defendant obtained an order for a devolutive appeal from this judgment on the fourth day of January, 1868, returnable according to law. She failed to give bond and bring up the appeal on the next return day for appeals from that district, to wit: the fourth Monday of January, 1868. On the twenty-ninth day of December, 1869, she gave bond and security, without having obtained any other order for an appeal.

On the fourth day of January, 1869, J. B. O. Hebert presented a petition to the Judge of the District aforesaid, stating that he was a creditor of the defendant, who, he alleged, was insolvent, and that he was aggrieved by the judgment rendered in the suit entitled *J. Trasi-mond Landry v. Widow Ursin Landry*, and praying for a devolutive appeal therefrom, which was granted; and he gave bond and security on the same day.

A motion to dismiss the appeals of both appellants has been made on the following grounds: That the defendant failed to give bond and

J. Trapmond Landry v. Widow Ursin Landry.

bring up the appeal on or before the next return day, for appeals from that district, to wit: the fourth Monday of January, 1868, and therefore the judgment is final. That the judgment, having become final and executory between the original parties to the suit, cannot be revised or amended for the benefit of an alleged aggrieved creditor.

So far as relates to the defendant the appeal must be dismissed on account of the failure to prosecute the original appeal. 4 La. 41; 3 An. 339; 10 An. 235; 1 R. 100; C. P. 594.

In relation to the intervening creditor, he has lost his right of appeal by his laches in not appealing before the expiration of the time in which the defendant's appeal was to be prosecuted. 7 N. S. 345. The judgment is *res judicata*.

It is therefore ordered that the appeals be dismissed at the costs of the appellants.

Rehearing refused.

No. 1918.—BURGESS, BENNETT, et als., v. THE CITY OF JEFFERSON, et als.

Paragraph twelve of section seven of the charter of the City of Jefferson (Laws of 1867, No. 57), requires that all contracts for opening, widening, paving, and improving the streets, authorized by the Common Council shall be adjudicated by the Controller, under regulations prescribed by the Council, to the lowest bidder. An adjudication by direction of the Council, by the Controller, of a contract for paving one of the streets of the city with the *Nicolson* pavement to a firm or company having the exclusive right to make such pavement within the limits of the State of Louisiana is in conflict with this provision of the statute; and the owners of property fronting on the street paved with this kind of pavement by a company having the exclusive right, cannot be compelled to pay the two-thirds of the cost of making the pavement.

The principle of competition enunciated by the statute must be observed by the Council in letting out contracts for the improvement of the streets, otherwise the owners of property fronting on the streets improved cannot be compelled to pay the charges assessed against them for making the improvement.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Duplantier, J. A. N. & H. N. Ogden*, for plaintiffs and appellants, *J. Hapkin and Fellows & Mills and H. J. Leovy* for defendants and appellees.

Howe, J. On the twenty-second April, 1867, a number of front proprietors on St. Charles avenue, in the City of Jefferson, petitioned the city for certain flag walks and for the paving of the street with the "*Nicolson* pavement." A list of their property and its dimensions was annexed, and the City Surveyor certified that the property signed for exceeded one half of all the property fronting on the avenue in the limits of the city of Jefferson.

On the twenty-fourth April the Council adopted a resolution or ordinance, directing the Controller to adjudicate contracts for the paving, and also for the curbing, to the lowest bidder, after advertisement, at such place and time as should be designated by the Controller. As to the paving, the resolution required the work to be done in strict accordance with the requirements of the patent.

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The Controller advertised the sale to take place on the eleventh May. On the same day A. D. Voisin enjoined the city from further proceedings, and the sale was postponed.

At a meeting of the Council, May 13, a petition was read, signed by property holders on St. Charles avenue, among whom were the owners of several hundred feet front, represented in the original petition, protesting against the sale of the contract. This petition was referred to a special committee, who, on the twentieth of May, reported that they had examined the matters complained of, and had ascertained that a majority of the front proprietors had originally petitioned for the improvement, and they therefore reported against the memorial of the petitioners.

On the fifteenth May, Mr. Voisin dismissed his suit and injunction, and on the twenty-fifth May the Controller adjudicated the contract for paving to Messrs. Taylor & Lockwood, at \$3 50 per square yard, and the contract for curbing to John Rooney, at \$1 per running foot.

On the twenty-ninth May the Council, by resolution, approved these adjudications, and the Mayor was empowered to enter into proper contracts by notarial act.

On the thirty-first May, the Mayor entered into a contract with Messrs. Taylor & Lockwood for the paving of the street with the Nicolson pavement. This contract is in conformity to and embodies the ordinance.

It is probable that a similar contract was entered into with John Rooney for making the curbs, but we do not find it in the record, and as will be seen, its merits are not before us.

On the twenty-fifth June, 1867, the plaintiffs, owners of property fronting on the avenue, and liable under a provision of the charter, hereinafter referred to, to be specifically assessed for their proportion of two-thirds of the cost of paving, and the whole cost of the curb, filed the petition now before us, praying in substance that the ordinance for the adjudication of the contracts be decreed to be illegal, null and void; that the City of Jefferson be enjoined from proceeding to collect from petitioners any portion of the contract price of said works by virtue of any clause in the charter rendering the petitioners as front proprietors, separately from other owners of property in the city, responsible for the cost of making banquettes and paving streets; and that it also be decreed, contradictorily with the contractors (who were made parties defendant), that the City of Jefferson has no rights against the property of petitioners in front of which the improvements were being made.

The court rendered judgment in favor of the plaintiffs in accordance with their prayer, as to the contract for the Nicolson pavement; but against petitioners as to the contract of Rooney for curbing. As to the latter, the plaintiffs have not appealed, and we cannot inquire into that

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portion of the judgment. From the portion of the judgment which concerns the paving contract, the defendants, the City of Jefferson, and the Southern Paving Company, subrogated to the rights of Taylor & Lockwood, have appealed.

The plaintiffs presented a number of points in the court below, but the court based its judgment so far as it was in their favor as to the paving upon one ground, namely: that the Nicolson pavement is a patented improvement, that the contractors, Taylor & Lockwood, held the exclusive right to lay such pavement in the State of Louisiana, and that therefore the competition which the law intended at an adjudication to the lowest bidder could not take place.

In the view we have taken of the case this is the only point that requires decision.

By paragraph six of section seven of the charter of the City of Jefferson (Laws of 1867, No. 57), the Common Council has power to lay an annual tax of one-half of one per centum for making improvements of streets and public works; by the tenth paragraph it has entire control of all the streets, levees, wharves and sidewalks of the city; by the eleventh paragraph it may make loans to pay for necessary ameliorations and improvements within the limits of the city (of which, in this climate and with our soil, paving is surely an important one), and by paragraph eighteen it has power to open, widen, straighten, extend or improve any street, road, sidewalk or public place.

The twelfth paragraph of the same section reads as follows:

"When the proprietors of land fronting on any public street or avenue, comprising one-fourth of the front on said street, shall petition the Council therefor, the Council shall cause the streets to be opened, widened or improved with banquettes, sidewalks, shell or plank roads, or paved streets, if after thirty days notice in the official journal a majority, similarly constituted, of front property owners shall not object thereto. The crossings and intersections of the streets and one-third of the roadways in front of the property shall be at the expense of the city, and the sidewalks or banquettes and one-third of the roadway or street at the expense of the property owners in front of whose property the same shall be made; *provided* all such work shall be done by contract, adjudicated by the Controller, under the regulations to be prescribed by the Council, *to the lowest bidder*; and, *provided further*, that said contractors shall be subrogated to the rights of the city against the property in front of which such improvements may be made, releasing the city from any liabilities for the same; and *provided further*, that the bills for such work, certified by the City Surveyor, and audited by the Controller, when recorded, shall have a lien and privilege in favor of the contractor upon said property for five years from the issuing of the bills for the amount thereof with interest, over all other claims and demands whatever, except that of the city, State, and national taxes."

It will be at once perceived by an examination of this charter that when the City of Jefferson exercises its general powers to improve a street, it is not bound to advertise for proposals or to adjudicate a contract to the lowest bidder. These formalities are only required when it proceeds under the twelfth paragraph quoted above.

It has therefore been urged by defendants that under these general powers the city had the right to cause the pavement to be made, and to charge two-thirds of the cost upon the front proprietors as, they allege, was customary in New Orleans and Lafayette prior to 1850, under powers no more extensive, and this course, they say, was held to be legal by a series of decisions of this court from 1830 to 1850. 1 La. 1; 7 An. 26; 10 An. 57. It is not necessary to decide this point in this case.

Admitting that the Council had the right under its general powers to cause this pavement to be laid, and of this we think there can be no doubt; and admitting, for the sake of argument, that it had the right to charge two-thirds of the cost, as an equitable proportion, on the front proprietors, it is plain that in this case it exercised only the former and not the latter right.

It directed the work to be done, and under its authority a contract to do the work was made, and thus far the proceeding was valid, but it did not proceed under its general powers, if such it had, to ordain an equitable assessment on front proprietors in proportion to the supposed benefit derived. On the contrary, as will appear by the ordinances and the contract, it proceeded under the special provisions of the twelfth paragraph, so far as front proprietors were to be bound, and, referring to these provisions, and not otherwise, took proceedings, which, if they had conformed to the requirements of that paragraph, and not otherwise, would have bound the front proprietors to pay two-thirds of the cost of paving; would by operation of law have subrogated the contractor to the rights of the city, releasing the city from liability *pro tanto*, and created a privilege on the property of the front proprietors.

In this view the question of the right to advertise for bids for a patented improvement, which can only be used by one person or company in the State, is, in this case, to be solved by a consideration of the stringent provisions of this twelfth paragraph alone. Upon this point, with this restriction, we do not think the court *a qua* erred in its conclusion. There could have been no real and practical competition for the work of paving in this case. One of the most intelligent of the defendant's witnesses admits this, and it would sufficiently appear without his evidence. And that an opportunity for real competition is a condition precedent to rendering effective the peculiar provisions of this twelfth paragraph is too plain to require argument. The power of a small minority to compel initiation of the work, and of a bare major-

ity to permit its completion, and the imposition of its burdens, is too grave to be exercised, except with a full compliance with the letter and the spirit of the clause. We are constrained to conclude that in so far as the city seeks through this clause to assess the plaintiffs, the act has been violated. We are fortified in this conclusion by the authority of the Supreme Court of Wisconsin in the case of *Dean v. Charlton*, 7 A. M. Law Reg., N. S. 564. In opposition to this view we have been referred to a recent decision of the Supreme Court of Michigan in the case of *Hobert v. the City of Detroit*, and to still more recent decisions of the Supreme Court of New York in the cases of *Astor v. the Mayor*, and *Dolan v. the Mayor*. In all these cases there was a feature which is not present in the case at bar. The defendants there were absolutely forbidden by their charters from contracting for any work, or even purchasing any supplies of any kind exceeding \$200 or \$250 in amount without advertisement and letting to the lowest bidder. In view of a provision which would seem to cut off those cities from the benefit of any patent however desirable, the courts in question seem to have been constrained in the interests of what they believed to be public policy, to adopt a line of reasoning which we do not feel authorized to follow. We are told by our Code, art. 13, that "when a law is clear and free from all ambiguity the letter of it is not to be disregarded under the pretext of pursuing its spirit;" and in this case we are relieved from any temptation toward a construction thus reprobated. The City of Jefferson is not prohibited from laying any sort of pavement in her streets, and may in this regard keep step with the progress of science and inventive skill. It is only when her action is provoked under the special paragraph we are now considering, that she is bound to afford an opportunity for real competition. If this system be inconvenient it is for the legislator to furnish a remedy.

It will be seen, however, that in one respect the judgment appealed from is erroneous, in so far as it declares the ordinance under which the contract was made null and void. The Council had a right under its general powers to order the work to be done and to authorize the Mayor to make the contract for that purpose. There are neither allegations nor proof in the case which would authorize us to pronounce the entire nullity of this action or of the action of the Mayor. So far as appears the ordinance and the contract are valid as between the city and the contractors. It is only in so far as by necessary intendment the front proprietors are held to the city for two-thirds of the cost and the contractors subrogated to the city's rights, releasing the city from liability *pro tanto*, and a privilege on property created, that the ordinance and action under it can be declared void.

The plaintiffs are amply secured and protected by the remainder of the judgment appealed from. It is therefore ordered and adjudged that said judgment as to such portion thereof as declares the nullity

Burgess, Bennett, et als. v. The City of Jefferson, et ala.

and illegality of the ordinance in question be reversed, and that in all other respects the said judgment be affirmed, the defendants to pay the costs of the court below and the appellees to pay the costs of this court.

No. 2007—JOHN HUDDLESTON v. MRS. SARAH COYLE.

Where the signature of a party to a promissory note is specially denied under oath, the burden of proof falls upon the holder, who will be bound to produce such evidence as the law requires to enable him to recover on the instrument. C. P. art. 325.

APPEAL from the Seventh Judicial District Court, Parish of Pointe Coupee. *Miller, J. Collins, Leake and Fisher*, for plaintiff and appellee, *Beatty & Yoist*, for defendant and appellant.

HOWE, J. This action is instituted to recover from the defendant, the widow of B. R. Coyle, the amount of a note alleged to have been executed as follows :

“\$1500.

WILLIAMSPORT, LA., November 9, 1861.

“Six months after date we, or either of us, promise to pay to the order of Wright & Allen, at the office of Wright & Allen, in New Orleans, fifteen hundred dollars, value received, with interest at eight per cent. per annum from maturity until paid, being for supplies furnished for the use of my plantation, and payable out of the first shipment of my cotton, which is hereby pledged to this amount.

“B. R. COYLE,

“SARAH COYLE.”

The plaintiff, indorsee, alleges that Mrs. Coyle executed the note by authorization of her husband, from whom she had been separated in property, and that the note was given for supplies furnished to her plantation.

The defendant denied under oath that she ever signed the note, or authorized the signing in any way, and averred that her alleged signature was forged.

There was judgment for plaintiff, and defendant has appealed.

As stated by counsel for both parties in this case, the issue is narrowed to one point, the question whether the defendant, Sarah Coyle, signed the note in suit.

“The law has expressly provided the kind of evidence which may be produced to counterbalance the express denial of a signature or the averment that it is counterfeited.” 9 La. 562.

In such case “the plaintiff must prove the genuineness of such signature, either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature, because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts, or by comparison of writing, as established by the Civil Code.” C. P. 325.

When the defendant, sued as maker of a note, denies his signature

John Huddleston v. Mrs. Sarah Coyle.

under oath, the testimony of witnesses who never saw the defendant write or sign his name, and who express their belief in its genuineness merely because it resembles other signatures which they presumed to be his, would not satisfy the requirements of the law. 15 La. 262.

The charge that a private writing has been counterfeited has some weight, and imposes upon the party seeking to enforce the obligation the burden of producing the counterbalancing evidence required by law in such a case. 18 An. 445.

The plaintiff in the case at bar has not produced such evidence. The two witnesses who state, on his behalf, their belief of the genuineness of the signature of Mrs. Coyle, speak of both signatures to the note, and base their belief upon their resemblance to signatures they had before seen in the course of their business, which they presumed to have been genuine. The first says:

"I recognize said signatures as being genuine, having paid many drafts bearing the same signatures, and never disputed by either party."

The second says:

"I recognize said signatures as being genuine on the ground that I have often and often seen said signatures." But when interrogated as to whether both signatures to the note were not written by the same person, he replies, "I cannot say."

Nor has the plaintiff furnished any "proof by experts or by comparison of writing, as established by the Civil Code." It results, then, that he has not complied with a single requirement of art. 325 C. P.

The wisdom of the rules established by law on this subject, and the necessity for their observance, appear at once from an inspection of the original documents attached to the record. The two signatures to the note are evidently written by the same hand, while the signature of Mrs. Coyle to a bond executed in 1858, and admitted to be genuine, is totally unlike the signatures to the notes. In the absence of proof that she signed the note or authorized any one to attach her name to it, we are at a loss to see how she can be made liable as a party to the instrument.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, with costs in both courts.

No. 1962.—Succession of JACOB WEIGEL, opposition of HELENA BETZ to the Inventory.

21	149
114	67
21	149
125	189

Where an appeal is granted on motion in open Court, the names of the appellees must be inserted in the appeal bond, otherwise the appeal will be dismissed for want of proper parties. 11 An. 315, 388; 19 An. 197.

APPEAL from the Second Judicial District Court of Louisiana.
Pardee, J. N. Commander and *W. B. Hyman*, for appellants, *W. O. Denegre*, for appellees.

LUDELING, C. J. A motion to dismiss this appeal has been made, on the ground that all the parties interested in maintaining the judgment of the District Court have not been made parties to this appeal. The order for an appeal was granted in open court. The bond is in favor of "*the succession of Jacob Weigel, his executors, administrators and assigns.*"

The administratrix caused an inventory to be made of the property of the succession; and Helena Betz filed an opposition to the inventory, claimed to be the owner of certain real estate, which had been placed on said inventory, and prayed that said real property be stricken from the inventory. This case having been tried in the lower court, was brought before this court by appeal; and our predecessors remanded it back to the lower court in order that the heirs might be made parties. The heirs, all of age, having been made parties, there was judgment in their favor, recognizing them as the owners of the property in dispute, and from this judgment an appeal was taken.

The bond is defective in not naming the heirs or using such terms as would clearly embrace them. 5 An. 574; 10 An. 232; 12 An. 71; 14 An. 315, 688. "An administrator is the trustee of the creditors." 2 An. 923. The heirs were necessary parties to the suit. C. P. art. 123; C. C. 1049.

The appeal is therefore dismissed.

NO. 2051.—JANE V. FLETCHER v. A. F. DUNBAR & Co., JOHN FLETCHER, Intervenor.

The filing of an answer by defendant, and trial on the merits, does not waive his right to, nor preclude the judge *a quo* from, considering and deciding a peremptory exception (filed at the same time with the answer) founded on law.

The exception that the petition discloses no cause of action will be sustained in a case where, if all the allegations are true, no judgment can be pronounced thereon.

APPEAL from the Thirteenth District Court, parish of Concordia, *Hough, J. Geo. S. Sawyer*, for plaintiff and appellant. *Mayo & Spencer* for defendant and appellee.

HOWE, J. The plaintiff in her petition avers that her brother, John Fletcher, and herself are the sole heirs of their father and mother; that their mother who died before their father, left an estate in community with him amounting to \$25,000, consisting principally in the Fletcher plantation, in the parish of Concordia; that on the twelfth December, 1859, their father—having previously acquired the son's fourth part—sold the undivided three-fourths of this plantation to Yorke and Hoover for the price of \$37,000, leaving her fourth interest undisposed of; that her father died on the twenty-ninth January, 1862, leaving an estate valued at \$30,000; that on the twenty-ninth July, 1862, her brother, John Fletcher, was appointed her guardian by the Probate Court of Adams county, Mississippi; that her brother established his

21	150
46	288
21	150
111	198

Jane V. Fletcher v. A. F. Dunbar & Co., John Fletcher, Intervenor.

residence in the parish of Concordia, and continued to act as her tutor, or as an intermeddler with her Louisiana property, appropriating its revenues to a large amount to his own use; that on the sixteenth of May, 1866, he repurchased from Yorke and Hoover the three-fourths of the Fletcher place, and gave up to them their notes they had executed for the price, amounting to \$25,000, a half interest in which belonged to her; that her brother has become insolvent and has rendered her an account of his acts in Louisiana; that on the thirtieth November, 1867, having become of age she had a formal settlement with her brother on account of his guardianship, in the Probate Court of Adams county, Mississippi, by which she was adjudged to have one-half interest in three-fourths of the Fletcher place purchased by her brother from Yorke and Hoover, to date from said purchase, which, with the one-fourth interest previously owned by her, gave her an interest of five-eighths in that plantation; that in said settlement she obtained a decree against her brother for \$5,800 for the rent of her interest in this plantation for the years 1866 and 1867, and that the rents of her fourth interest therein for 1862, '63, '64, '65, '66, were worth \$1000 per annum; and that on the thirtieth November, 1867, she obtained judgment in the District Court of the parish of Concordia, rendering executory her judgment of the Probate Court of Mississippi, for the sum of \$5,800, and decreeing in her favor a tacit mortgage on all her brother's property to date and take effect from the first January, 1867.

She further complains that on the twentieth September, 1867, her brother mortgaged one-half of the Fletcher place and other property to A. F. Dunbar and John C. Baker, of New Orleans, for \$12,000, in fraud of her rights, and she claims the right to have this mortgage canceled so far as the same affects her mortgage and concludes with the prayer that she have judgment against Dunbar and Baker, decreeing her tacit mortgage for \$58,000 valid, and giving the same priority and precedence over that of the defendants, and decreeing the property to be sold free from all incumbrance in consequence of the latter mortgage.

The defendants prefaced their answer by a peremptory exception that the plaintiff's petition disclosed no cause of action, and prayed that the suit be dismissed, and with a *protestando* proceeded to plead to the merits. The case was tried on the merits, and the judge *a quo* gave judgment sustaining the exception, and dismissed the suit as in case of non-suit. From this judgment the plaintiff has appealed.

It is urged by plaintiff that by going to trial upon the merits the defendants waived their peremptory exception, and the judge *a quo* had no right to consider and maintain it after the trial. This view may be correct when the exception is to matters of form, but it is incorrect when applied to such an exception as the one now before us. *Martin v. McMasters*, 14 L. 422. *

Nor do we think the court below erred in sustaining the exception.

Jane V. Fletcher v. A. F. Dunbar & Co., John Fletcher, Intervenor.

Admitting the truth of all the allegations in the plaintiff's petition, we can perceive in them no cause of action. It appears that in September, 1867, when John Fletcher mortgaged one-half of the Fletcher plantation to the defendants he was the owner of at least one-half.

No fraud is charged against the defendants. It is not averred that they knew the plaintiff to be equitably entitled to five-eighths of the place instead of one-half. It is not alleged that they obtained the mortgage by evil practice, or that the sum secured by it was not a just debt, or that any dishonest preference was sought to be obtained by them, or that they are seeking to enforce their mortgage to the prejudice of her rights. It does not appear even that they claim a lien prior to that of plaintiff. Indeed, if we are to believe the allegations of the petition, her mortgage is prior to their's, dating back, as it purports to do, to January 1, 1867. We cannot see therefore any foundation for the prayer that the mortgage of the defendants be canceled so far as it affects her mortgage.

For similar reasons there is no foundation for the prayer that the plaintiff's mortgage be declared prior to that of the defendants'. It is not necessary to decide whether, under the allegations of the petition, it is really prior or not. It is enough to say that if by the effect of the judgment of November 30, 1867, it be prior, there is no necessity for the relief invoked; if it be not prior as matter of fact and law, there are no allegations in the petition which, if taken for true, would justify a court in now adjudging a preference.

In brief, we have sought diligently in this case, to discover a cause of action, but without success. When the mortgages are sought to be enforced a proper occasion will arise to settle preferences and distribute proceeds.

It is ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 1964.—STATE OF LOUISIANA, ex rel. of W. & H. STACKHOUSE, v. THE JUDGE OF THE FIFTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

An appeal will be from a judgment dissolving an injunction taken out against an order of seizure and sale. The amount of the appeal bond to entitle the plaintiff in injunction to a suspensive appeal is one-half over and above the amount of the judgment dissolving the injunction. A suspensive appeal from a judgment dissolving an injunction against an order of seizure and sale will suspend the execution of the order until the judgment is affirmed by the Supreme Court.

After a suspensive appeal has been granted and the bond is signed and filed the Judge of the court *a qua* has no jurisdiction of the cause further than to ascertain that the security is good and solvent.

APPPLICATION for a writ of prohibition. *Judge Leauumont*, in personam. *Roselius* and *Philips*, for relators.

21 152
120 634
120 637
120 639

State of Louisiana, ex rel. of W. & H. Stackhouse, v. The Judge of the Fifth District Court for the Parish of Orleans.

HOWELL, J. The relators allege that on the thirty-first January, 1867, James E. Zunts obtained an order of seizure and sale on two notes for \$25,000 each, with six per cent. interest from February 1, 1864, to February 1, 1866, the date of their maturity, and eight per cent. thereafter, and secured by mortgage on a plantation in the parish of Plaquemines; that on petition they obtained an injunction upon giving bond with security for \$7000; that Zunts filed an answer to said petition, praying for the dissolution of the injunction with costs and for the maximum damages, interest and attorney's fees against petitioners and their sureties *in solido*; that on the trial of said suit judgment was rendered against petitioners, dissolving the injunction and condemning them to pay twelve per cent. damages and eight per cent. interest on the amount of the judgment enjoined, together with costs of suit, which damages and interest amount to \$13,300; that within ten days they applied for and obtained a suspensive appeal from the same, on giving bond and security in such sum, and conditioned as the law directs; that they furnished a bond with good security for \$25,000, being more than one-half over and above the judgment rendered against them; that afterward said Zunts took a rule on them to show cause why said suspensive appeal should not be set aside and execution issue, on the grounds that the surety on the appeal bond was not good and solvent, and said bond not sufficient in amount for a suspensive appeal, which rule was made absolute and the appeal dismissed on the second ground; and that said Zunts is about to execute his order of seizure and sale and the judgment for damages, and they pray for a writ of prohibition commanding the Judge of the Fifth District Court for the parish of Orleans not to proceed any further in said suit, and to allow the transcript of appeal to be sent up, the same as if the order of dismissal had not been rendered.

To this the Judge answers, in substance, that the appellants failed to give an appeal bond, as the law directs, for a sum exceeding by one-half the amount of the judgment debt, interest and costs under article 575 C. P.; that the bond on which the injunction issued, not being authorized by law, is no protection to the plaintiff in the seizure and sale, and to have said writ suspended during an appeal from the judgment in the injunction suit, a bond for a sum exceeding by one-half the amount so enjoined and the damages, interest and costs also, is necessary; that executory process can be enjoined only for the causes prescribed in art. 739 C. P., in which no bond can be required, and that the cause or ground for the injunction in this case being fraud and other unlawful means, no bond should have been required, and consequently the surety on said bond could not be made liable; that it is only in cases where a party is bound by law to give an injunction bond that he can obtain a suspensive appeal from a judgment dissolving the injunction without giving security for the debt enjoined; that art. 575 C. P., making no distinction as to the amount of the bond for a suspensive appeal, the court can make none, and he refers to the case of the State v. the Judge of Third District, 18 L. 444, as authority.

State of Louisiana, ex rel. of W. & H. Stackhouse, v. The Judge of the Fifth District Court for the Parish of Orleans.

The merits of the injunction suit cannot be inquired into in this proceeding, and hence it is unnecessary to determine whether or not the causes set out in the petition for injunction are such as article 739 C. P. authorizes. The only question is, whether or not the relators are entitled to a suspensive appeal on the bond furnished by them, and here it is pertinent to inquire from what judgment the appeal is taken. Certainly not from the order of seizure and sale. It is only from the judgment rendered in the injunction suit. This judgment dissolves the injunction and condemns the relators, plaintiffs in injunction to pay \$13,300 and costs, and for a suspensive appeal therefrom a bond for an amount exceeding by one-half such sum is, by art. 575 C. P., sufficient if taken in time. This is the only and legal inference from the terms of the order of the Judge granting the appeal. The relators and appellants have complied with said order. Whether or not this appeal suspends the executory process depends alone upon the question whether or not it was suspended by the injunction; for if it was suspended by that writ it remains legally suspended until the judgment dissolving the injunction becomes final, and by law said judgment does not become final until affirmed on appeal duly and properly taken. That the executory process was suspended by the writ of injunction is not denied. The proceedings thereon by the plaintiff in the seizure and sale admit and confirm this. The sale is arrested by the injunction and the appeal maintains the case in *statu quo* until the judgment dissolving the injunction can be reviewed by the appellate court. On the appeal what judgment can be rendered against the appellants? Not one for the debt enjoined, but at most one affirming that appealed from with, possibly, increased damages and costs. The injury caused by the delay is covered by the judgment for damages, which is secured by the appeal bond. The debt enjoined is secured by the property under seizure or mortgage.

We do not deem this the occasion to pass on the necessity and validity of the injunction bond or the liability of the surety thereon; but we consider it proper to state that the reasoning in the case in 18 L. 444 does not satisfy us that a bond for the mortgage debt and the damages is necessary for a suspensive appeal in an injunction issued without bond under arts. 739 and 740 C. P. The authority of that case is greatly weakened by the reasoning in the one of the State v. The Judge of the First District, 19 L. 167, which we believe to be more consonant with the principles of law relating to the question before us. We know of no law which requires such a bond. The plaintiff in injunction in either case is entitled to the protection of the court so long as the matter in controversy is undetermined. And besides, it is well settled that after a suspensive appeal is once granted and the bond is signed accordingly, the Judge of the first instance has no jurisdiction of the cause further than to ascertain that the surety is good and solvent. 19 L. 173, 178, and cases there cited.

State of Louisiana, ex rel. of W. & H. Stackhouse, v. The Judge of the Fifth District Court for the Parish of Orleans.

Our conclusion is that the appeal taken by the relators is suspensive and that they are entitled to the writ applied for in this proceeding in order to have the merits of their injunction examined in this court.

It is therefore ordered that the prohibition issued herein be made perpetual, and the Judge of the Fifth District Court for the parish of Orleans ordered not to proceed any further in the suit of W. & H. Stackhouse v. James E. Zunts, No. 18,850, on the docket of this court, and to allow the transcript of the record thereof to be sent to the Supreme Court as if the order dismissing the suspensive appeal had not been rendered.

No. 1768.—B. L. MANN & Co. v. C. W. NORTON, C. REILLY, third opponent.

Notice of seizure and demand are necessary to interrupt prescription in a proceeding by executory process.

When the notice has not been served until after prescription has accrued, the plea will be maintained. 20 An. 192.

APPEAL from the Third District Court, of New Orleans, *Theard*, J. of Fourth District Court of New Orleans, presiding. *John McKee* for appellants. *Breaux & Fenner* for appellee. *E. T. Fellowes*, curator *ad hoc*, for C. W. Norton.

HOWELL, J. The only question presented in this proceeding is, whether the institution of suit by executory process interrupts prescription?

The plaintiffs and appellants rely on the case of *Walker v. Lee*, 20 A. 192, and the cases therein cited, to sustain the affirmative of this question. But the interruption of the prescription in those cases was based entirely on the fact that notice of demand and seizure was served before prescription was acquired, likening such notice to the citation required by Articles 3484, 3516 and 3517 C. C. In this case the requisite notice was not served until after prescription had accrued, and there was therefore no interruption.

Judgment affirmed.

ON MOTION TO DISMISS.

HOWE, J. A motion has been made to dismiss the appeal in this case on the ground that the matter in dispute does not exceed five hundred dollars. The matter in dispute is a note for \$337 50, on which an aggregate of interest to the amount of fifty-eight per cent. was due at the institution of the suit, and therefore exceeds five hundred dollars; and the motion to dismiss must be denied. *Schlenker v. Taliaferro*, 20 An. p. 565.

No. 1701.—STATE OF LOUISIANA v. CLINTON AND PORT HUDSON RAILROAD COMPANY.

Where a judgment rendered in favor of an opposing creditor on opposition to a liquidator's account has become final, and forms *res judicata*, the liquidator will not be allowed, in answer to a rule to show cause why it should not be paid according to its rank and privilege, to go behind the judgment and set up defenses that might have been pleaded before judgment.

APPEAL from Fifth District Court, Parish of East Feliciana, *Posey, J. Hunter*, for appellant. *McVea*, for appellee.

Wray, J. On the opposition of H. Hawford to the final account of B. Haynes, liquidator of the Clinton and Port Hudson Railroad Company, there was judgment for said Hawford on the twenty-sixth November, 1858, for \$500, with eight per cent. interest from fifth August, 1847, "to be ranked as one of the privileged law charges against said corporation."

On the seventh June, 1867, a rule was taken on the present liquidator of said company, Charles McVea, to show cause why said judgment should not be allowed and paid as a privileged claim. This rule was made absolute, and the defendant has appealed.

The defendant, Charles McVea, liquidator, etc., sets up that when L. Sanders and others, commissioners of said Railroad Company, filed their account, the plaintiff in this rule opposed the same, on the ground that no interest was allowed on his claim, and on the eleventh February, 1854, there was judgment on that opposition, dismissing the same and homologating the commissioner's account.

This seems to be merely a contest about the interest on the claim of plaintiff in the rule.

The liquidator contends that the payment of interest is not warranted by law, and claims that if either judgment should be paid it is the one rendered on the opposition to the commissioner's account, on the eleventh February, 1854.

This rule is based upon a judgment rendered contradictorily with B. Haynes, the former liquidator, on the twenty-sixth November, 1858, wherein the plaintiff recovered judgment for \$500, with eight per cent. per annum interest thereon, from the fifth August, 1847, with the rank of one of the privileged law charges against said corporation. No appeal has been taken, and that judgment is now "*res judicata*."

The judgment of the eleventh of February, 1854, might have been used as a defense against the allowance of interest on the trial of the opposition to the liquidator's account in 1858. It cannot be set up now.

The defendant will not be permitted to go behind that judgment and urge the defense which should have been made at the time.

It is therefore ordered that the judgment appealed from be affirmed with costs.

James Porter Parker v. Alfred Davis, Executor.

No. 2052.—JAMES PORTER PARKER v. ALFRED DAVIS, Executor.

If the appellee reside in another State, citation is to be made on the Advocate, not the agent or attorney in fact. C. P. 582 ; 4 L. 317.

APPEAL from the Thirteenth Judicial District Court, Parish of Tennessee. *Farrar, J. Shaw & Aroni*, for defendant and appellant. *Farrar & Reeves*, for plaintiff and appellee.

TALIAFERRO, J. There is a motion to dismiss the appeal taken in this case, on the ground that no legal citation of appeal has been given to the appellee. It seems that the counsel for the appellant, assuming that James Porter Parker, the appellee, when the order of appeal was rendered, resided in the State of Mississippi, caused a *curator ad hoc* to be appointed to represent him, and upon the *curator ad hoc* the citation of appeal was served—the person appointed being the attorney who represented the plaintiff in the case from the judgment in which the appeal was taken.

We think the citation clearly defective. Article 582 of the Code of Practice is express that “the sheriff shall serve the petition and citation on the appellee, if he reside within the State, or his advocate if he do not, by delivering a copy of the same to such appellee, or to his advocate, by leaving it at the place of their usual domicile.

It is therefore ordered that the appeal be dismissed at the costs of the appellant. 4 L. R. 317.

No. 2063.—STATE OF LOUISIANA v. E. ELDER.

21	157
Case 2	
120	344

In providing against the crime of arson our statute makes no distinction in reference to the ownership of the house or building destroyed by fire, whether belonging to the accused or to a third person. And the only object of the allegation of ownership of property in the indictment is to describe and identify the object of the crime.

The possession, occupancy and control of a house or barn and stable that has been destroyed by fire, may be shown by parol evidence in the prosecution of a party charged with the crime of arson.

Under the statute of 1855, page 137, providing against the crime of arson, the State will be allowed to amend the bill of indictment in all matters relating to the form thereof.

After the jury was empaneled and the trial commenced, the District Attorney moved to amend the indictment by inserting the words “the aforesaid barn and stable being,” which was allowed by the court. Held—That this amendment does not alter the substance of the indictment, or create a new or different charge.

APPEAL from the Fifth Judicial District Court, Parish of East Baton Rouge. *Posey, J. Stafford*, for appellee. *Burgess*, for appellant.

HOWE, J. This case comes before us on three bills of exceptions, reserved by the defendant, who was indicted for feloniously, willfully and maliciously setting fire to and burning “the barn and stable, not adjoining to a dwelling house, the property of W. J. Sharp,” and was convicted and sentenced to imprisonment at hard labor.

First—On the trial, after the jury had been empaneled, the District Attorney was permitted by the court to amend the indictment so as to make the clause quoted above read as follows: “The barn and stable,

not adjoining to a dwelling house, *the aforesaid barn and stable being the property of W. J. Sharp.*" To this permission the defendant reserved an exception.

Second—On the trial the State "offered parol evidence to prove title to the barn and stable attached to and partaking of the reality to be in W. J. Sharp," and the court overruled the objection of defendant thereto, on the ground that it was only necessary to prove possession *suo jure* on W. J. Sharpe at the time of the burning, which could be done by parol; and to this defendant excepted.

Third—The State further offered evidence to prove that the property burned was the property of Mrs. Sharp, wife of W. J. Sharp, and the court overruled the objection of defendant thereto, on the ground that the witness, W. J. Sharp, had stated in his testimony that he resided with his wife on the plantation upon which the property burned was situated, and that he was in possession of said plantation, and that it was controlled and managed by him, and to this the defendant excepted.

The prosecution seems to have been instituted under the forty-ninth section of the act of March 15, 1855; but, as this was amended and reenacted by the act of March 18, 1858, the case is governed by the third section of the latter statute.

As to the amendment we see no error in the ruling of the court. The indictment was good, by a reasonable construction, before the amendment; no real change was made; and it seems impossible that the defendant could have been in any way affected by an addition of words which the State, through abundant caution, was permitted to make.

The questions presented by the second and third exceptions are somewhat complicated by the manner in which the bills are drawn, but taking the two together we suppose that on the trial the State proved by parol that W. J. Sharp was in the possession, occupancy and control of the buildings destroyed, and further proved, by showing the legal title in Mrs. Sharp, that the possession, occupancy and control by Mr. Sharp were lawful.

Under our statute it was not necessary to aver and prove the ownership of the property, as at common law, to be in some person other than the accused; (8 An. 114; 12 An. 382); and the only object of the allegation of property in Sharp was to describe and identify the object of the crime. The possession, occupancy and control by Sharp could be proved by parol, and, when proved, fully supported the allegation of property in him. Greenleaf on Ev., vol. 3, p. 49; State v. Lyon, 12 Conn. 488; Glanfield's case cited in Russell on Crimes, vol. 2, p. 565.

The evidence that the legal title was in his wife seems to us, in this case, to have had no other object or effect than to show his possession, occupancy and control to have been rightful, and the defendant has no cause to complain if the State introduced more evidence on this point than was absolutely necessary.

We cannot perceive that the court erred in its ruling, and it is therefore ordered and adjudged that the judgment appealed from be affirmed.

James A. Lusk v. Graham & Cole.

No. 1407.—JAMES A. LUSK v. GRAHAM & COLE.

Where one of three partners sells his interest in the partnership to the other two, who execute their agreement in writing signed in their individual capacity, which he terms a counter letter, and he afterwards brings suit for a liquidation and settlement of the partnership affairs, and to recover his share of the profits according to the terms and stipulations of the counter letter, any amount that may be found to be due by them on account of the purchase or profits must be borne jointly, and not *in solido*, each paying one-half thereof.

The rule to be observed in making a settlement of partnership transactions is to ascertain the value of the assets, composed of the property, credits and receipts belonging thereto, and from the aggregate amount deduct the debts and expenditures; the balance remaining to be divided in accordance with the terms and stipulations of the partnership.

A PPEAL from the Fourth District Court of New Orleans, *Theard*, J. *C. Roselius* and *R. H. Marr*, for plaintiff and appellant, *Clark & Bayne* and *P. Soule*, for defendant and appellee.

HOWEL, J. In 1855 the plaintiff and defendants, as partners under the style of Graham & Co., had a contract with the city of New Orleans for the collection of the revenues of two sections of the wharves, for three years from the first of October of that year. On the twenty-seventh of October, 1857, the plaintiff, by contract under private signature, afterwards made authentic, sold his interest therein to the defendants for the sum of \$8,813 94, retaining the following agreement which he terms a "counter letter."

"WHEREAS, James A. Lusk has this day transferred to us his interest in the wharves and in the firm of Graham & Co., for the sum of eight thousand eight hundred and thirteen and ninety-four one hundredth dollars, we agree, after the affairs of Graham & Co. connected with the wharves, are all liquidated, in case one third of the profits amounts to more than the above sum, to pay the said Lusk or anybody he may assign this to, one third of the amount of profits over and above the amount specified above, reserving the right to deduct any amount that may be due, or for which we are responsible for J. A. Lusk, L. Y. Lusk and Lusk & Co., either to Josiah Cole or D. S. Graham.

(Signed)

"JOSIAH COLE,

"D. S. GRAHAM."

In December, 1858, J. A. Lusk brought this suit for a liquidation and settlement of the partnership and to recover his share of the profits, upon the theory that the above instrument continued the partnership as it was before the transfer. After the proceedings in the lower court had advanced to a certain stage, the plaintiff took an appeal from the rulings of the judge *a quo* to this court, when the opinion was expressed, that the parties had acquiesced in the ruling of the lower court, to the effect that the plaintiff had no right, as a partner by virtue of the counter letter, to demand a liquidation and settlement of the partnership affairs, but that as a creditor of the firm he had the right to demand the rendition of an account, for the purpose of ascertaining the surplus of one third of the net profits, if any, to which he

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might be entitled under the agreement, in addition to the fixed price of \$8,813 94; and that the account thus to be rendered should embrace the business of the partnership from the date of the partnership contract and not from the date of the counter letter, as contended by the defendants; and it was decreed that the auditors to whom the accounts between the parties had been referred, "pass upon and state the accounts between the plaintiff and defendants, from the date of the contract of partnership," and the cause was remanded for further proceedings.

This appeal is taken by plaintiff from a judgment homologating the report of the umpire upon said reference, the two auditors representing the parties not agreeing.

This report professes to be in conformity to the order of the Supreme Court and proceeds upon the basis that the accounts between the parties were adjusted at the date of sale and counter letter, and as the books of the concern had been destroyed by fire prior to said date, the examination was confined to the accounts subsequent thereto, taking the price then agreed on (\$8,813 94) as the measure of plaintiff's interest in the profits to said date, and which sum is stated as the amount then due by plaintiff to defendants, to be deducted from the profits subsequently accruing to plaintiff.

To this report, which finds a balance due by plaintiff, he filed objections, which he calls exceptions, asserting its nullity as to forms of proceeding, and denying its correctness in substance.

As we are called on to dispose of the case on the record before us, we deem it unnecessary to express an opinion upon the question of form, and will use the report so far as supported by evidence and admissions, as an aid in coming to our conclusion.

According to the counter letter, the plaintiff sold his one-third interest in the wharves to the firm of Graham & Co. for \$8,813 94, with the understanding that if, upon a final settlement of the affairs of said firm connected with the lease of the wharves, one-third of the net profits should exceed said sum, such excess should be paid to him as a further consideration or price, deducting therefrom any indebtedness of J. A. Lusk, the plaintiff, L. Y. Lusk and Lusk & Co. to the vendees, Cole & Graham. The sum of \$8,813 94 was fixed and paid, with a contingency that it might be increased, if the wharf contract with the city should turn out so far successful as to make one-third of the net profits upon the whole contract exceed that sum. If it should prove unsuccessful or unprofitable in its total result, plaintiff would still have realized that sum by his connection with it.

We think the process of ascertaining the profits, in principle, a simple and easy one, the assets, composed of the property, credits and receipts to be ascertained, and from the aggregate deduct the debts and expenditures. If one-third of the balance exceeds \$8,813 94, this sum

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must by the terms of the counter letter be deducted, and the remainder paid to plaintiff.

This course, however, has not been pursued by any of the auditors, who have all investigated only the accounts subsequent to the twenty-seventh of October, 1857, except two items (cash on hand at that date, and sundry bills then existing but afterwards paid by the vendees, Graham & Cole), which make no material change in the result.

After a careful examination of all the facts and figures, we have concluded, as the only course authorized by the record, to adopt the hypothesis, that at the date of the transfer by plaintiff to defendants, the former had received from the concern \$8,813 94 (the price stipulated) more than his share of the actual cash profits realized, without reference to the stock of materials, etc., then on hand, and that at the end of the lease the excess of one third of the net profits over said sum is due to him. The fact as shown, that this sum is the exact amount he then owed the partnership, and the small amount of cash on hand at the time sustain this view, which will enable us to effect an equitable adjustment of the rights of the parties, without the expense and delay of another reference to auditors, and without a specific and detailed account of all the business prior to said transfer, which would be more satisfactory and in accordance with the former decree of this court.

We have availed ourselves of the calculation made by plaintiff's counsel in "statement No. 1," making such corrections as we think the record supports.

The first correction is in the item of cash received from "wharfage dues," which plaintiff takes from the bank book of deposits, and the defendants from the "collection books." It is shown that the revenues of the wharves were the only source of income of the partnership business, and that, as collected, they were regularly entered in the "collection books," and we therefore consider these books rather than the bank book, as the correct evidence of said receipts. These various books are not before us, but we may presume that items of cash in the account of defendants with the bank, such as price of a steamboat, dividends on stocks, sums checked out and returned, etc., may constitute some of the deposits and account for the alleged discrepancy in the several books. We do not consider plaintiff in the situation to avail himself of any presumptions against defendants as to this matter. His opportunities to make it clear seem to be little less than those of defendants. We include \$120 dividend on stock of Bank of America, contained in the report of defendants' auditor, but not in the statement of counsel. Of the disbursements, to the item for materials, labor, expenses, etc., as proved by Starke, plaintiff's auditor, we add the two sums \$466 and \$200, for the omission or rejection of which we see no good reason. They are evidently a part of the transactions of the concern and rest upon the same basis as similar items.

We limit the salaries of the parties to October 1, 1858, when the lease terminated and their reciprocal contract as to this matter expired. Having assumed plaintiff's obligations to the city, the defendants were

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bound to him to put the wharves in good order, and if they delayed doing so until after the expiration of the lease, they cannot properly charge him a salary for superintending such work. For the cost of these repairs we adopt the figures of plaintiff's auditor as correct.

We thus have the following statement:

ASSETS.

Cash on hand October 27, 1857.....	\$3,191 35
Wharfage dues from October 27, 1857, to October 1, 1858....	143,428 30
Price of steamer Grenada.....	4,000 00
Dividend on stock of Bank of America.....	120 00
Received for labor in September, 1858.....	150 00
Wharfage of steamers Bluff City, Eclipse, America and Trabue.....	489 40
Materials, labor, etc., taken to account by Graham & Cole.	5,850 51
Sale of 20 shares Bank of America stock and dividends....	2,360 00
Dividends on stock of Texas Steamship Company.....	2,670 00
Sale of tools, machinery, etc., to city.....	3,140 50
Use of same after October 1, 1858 (in report of umpire)...	405 00
Total assets.....	\$165,805 06

DISBURSEMENTS.

For materials, labor, wages, price of steamer Grenada.....	\$29,517 16
For Bank of America stock.....	1,916 97
For rent notes to the city.....	51,346 18
For salary of J. A. Lusk from November 1, 1857, to October 1, 1858.....	1,375 00
For salary of D. S. Graham from November 1, 1857, to October 1, 1858.....	1,833 33
For salary of J. Cole from November 1, 1857, to October 1, 1858.....	916 67
For rent of office eight months.....	120 00
For repairing wharves (Starke's report).....	19,000 75
For sundry bills incurred before and paid after October 27, 1857.....	4,638 96
Total disbursements.....	\$110,665 02
Balance, profits.....	55,140 04
	\$165,805 06

CR.

Profits brought down.....	\$55,140 04
Lusk's one third thereof.....	\$18,380 01
Lusk's salary, unpaid, to October 1, 1858.....	625 00
Rent of office to Lusk.....	120 00
	\$19,125 01

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DR.

Amount paid Lusk, October 27, 1857,.....	\$8,813 94	
Amount paid Lusk by Graham, September, 1858.	7,500 00	
Amount paid Lusk by Cole, September, 1858....	1,260 00	
Amount wharfage of Bluff City, charged to Lusk.	220 00	
Amount wharfage of Eclipse and America, charged to Lusk.....	184 40	
		\$17,978 34
Balance due Lusk with five per cent. interest from October 1, 1858.....		<u>\$1,146 67</u>

From these figures it will be seen that the price actually received by Lusk for his interest in the lease of the wharves, \$19,125 01, besides what, upon the hypothesis adopted by us, he realized prior to the date of his transfer to the defendants—twenty-seventh October, 1857. The presumption is, from the character of the business, he drew his profits as they accrued, and that at said last date, he had overdrawn his share to the amount of \$8,813 94, and during the remaining eleven months he received from his former partners \$8,760 besides his salary.

It is therefore ordered that the judgment appealed from be reversed, and that the plaintiff recover from the legal representatives of the defendants *in solido* the sum of eleven hundred and forty-six and sixty-seven one hundredth dollars with legal interest from October 1, 1858, until paid and costs of suit in both courts.

ON REHEARING.

Howe, J. A rehearing was granted in this case upon the single question whether or not the defendants are bound *in solido*.

We are of opinion that the obligation of the defendants was joint, and not solidary.

It is therefore ordered that the judgment heretofore rendered by us be set aside. It is further ordered that the judgment appealed from be reversed, and that the plaintiff recover from the legal representatives of the defendants the sum of eleven hundred and forty-six and sixty-seven one hundredth dollars with legal interest from October 1, 1858, until paid, and costs in both courts. One half to be paid by the representatives of the defendant Graham, and one half by the representatives of the defendant Cole.

Jefferson Thomas v. Oran Hacket, Administrator.

No. 2086.—JEFFERSON THOMAS v. ORAN HACKET, Administrator.

When the record shows that a twelve months' bond has been given for the price of slaves sold under execution, payment thereof cannot be legally enforced, nor will the purchaser be permitted to recover back any portion of the price he may have paid. The doctrine in the case of *Wainwright v. Bridges*, 19 An., page 234, reaffirmed.

APPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. *Posey, J. Favrot & Lamon*, for appellee, *Burgess & Chaney, Fuqua & Caliham*, for appellant.

Howe, J. On the twenty-sixth March, 1861, Andrew Matta recovered judgment in the Sixth (now Fifth) District Court, parish of East Baton Rouge, against William Thomas and Richard Thomas *in solido*. A writ of *feri facias* was issued and the defendants surrendered three slaves, which after an ineffectual attempt to sell for cash, were on the third August, 1861, sold on twelve months' credit, and adjudicated to one of the defendants, William Thomas, who, with the other defendant as co-principal, and the plaintiff in this case as surety, executed a twelve months' bond for the judgment debt. On the ninth October, 1865, a writ of *feri facias* was issued on this bond, and by process of garnishment the sum of \$945 95, due the surety, plaintiff in the case at bar, was collected. On the seventeenth June, 1867, the plaintiff herein filed the petition now before us against the defendant as administrator of the succession of Andrew Matta, praying that the bond be canceled and the mortgage resulting from it erased, and demanding also the recovery of the sum collected from garnishees for the reason substantially that the consideration of the bond was the sale of slaves. The defendant pleaded the general denial, a special denial that the sale of slaves formed the consideration of the debt on which the judgment was rendered, and for which the bond was executed, and the prescription of one year.

The court *a qua* gave judgment that the bond be canceled and annulled, so far as the plaintiff, the surety, is concerned, respecting the claim for the recovery of the sum already collected, and the defendant appealed. We find in the record no answer to the appeal or prayer by appellee for an amendment of the judgment, and it is therefore unnecessary to consider the suggestion in the brief of appellee that the judgment should be amended so as to permit the plaintiff to recover the sum collected by garnishment.

The consideration of the bond in question was clearly the sale of slaves of William Thomas and Richard Thomas, to the former under the first writ of *feri facias*. Under the authority of *Wainwright v. Bridges*, 19 An. p. 234, and the numerous cases which have followed that decision, we are of opinion that the court *a qua* did not err in its judgment.

It is urged by defendant that there was no sale of slaves in this case because the property of the debtors was bid in by the debtors themselves, and that the defense, that the consideration of the bond was the sale of slaves, cannot therefore be set up by plaintiff.

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We do not feel called on to decide what might be the rule if this view of the facts of the case were correct. But we think it fully established that the slaves of the judgment debtors were sold not to themselves but to one of them. The defense of prescription appears to have been abandoned.

For the reasons given, it is ordered and adjudged that the judgment appealed from be affirmed with costs.

21	165
117	932

No. 2103.—BENJAMIN BUTMAN v. PETER FORSHAY, et. al.

A motion to dissolve an injunction on the face of the papers may be made after issue joined, in trying which, all the allegations of the petition are taken as true.

An execution cannot be enjoined on grounds that might have been pleaded before judgment.

The District Court that rendered the judgment, alone has jurisdiction of the action to annul it.

C P. 608 ; 2 A. 493.

A PPEAL from the Sixth District Court, parish of St. Helena, *Ellis, J. E. F. Russell* and *Julius E. Wilson* for plaintiff and appellant. *E. J. Ellis* for defendant and appellee.

WYLY, J. Plaintiff has enjoined the defendant and sheriff of the parish of St. Helena from selling his property seized to satisfy a judgment recovered against him by the defendant in the parish of St. Tammany.

He avers that said judgment was illegally and improperly rendered against him on the following grounds, to wit: Being absent from the State at the time said judgment was rendered, he knew nothing of the filing of said suit and made no defense; that he had a good defense; "that the transaction or sale by the defendant to him for which the notes sued on were given was made in June, 1863, at a time when the almost exclusive currency of the country was in Confederate treasury notes; that said treasury notes were the real consideration both in the contemplation of the petitioner and the said Forshay, and that the cash payment at the time of said transfer was really and actually made in said treasury notes; that the notes given for the balance of the five hundred dollars were made payable at the office of Captain Warren A. Grice, the notary before whom said act of sale was passed; that petitioner deposited the full amount due on said notes in said Confederate treasury notes at the office of said Warren A. Grice, for the full payment of said notes before their maturity, which deposit was made in strict conformity with the agreement made between said Forshay and petitioner at the time of said transfer."

Plaintiff also alleges that he offered to pay the defendant Forshay in United States currency the value of the Confederate notes at the time the notes sued on fell due. He also avers that the judgment on which the execution issued was "not rendered in accordance with the provisions of organic law in so much as the reasons for the judgment are not set forth," and he asks that said judgment be annulled.

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The answer is a general denial, an allegation that the injunction was obtained wrongfully and illegally in a court without power to grant the same, and prays that the injunction be dissolved with damages.

The defendant Forshay subsequently moved to dismiss the injunction on the face of the papers; first, because plaintiff's petition shows no cause of action; second because the bond is worthless, the surety being insolvent; third, because of the insufficiency of the affidavit, and fourth, because his judgment cannot be attacked in this way by plaintiff.

There was judgment dissolving the injunction with fifty dollars damages, and plaintiff has appealed.

The motion to dissolve the injunction on the face of the papers can be made after issue joined. In trying the motion all the allegations of the petition are taken as true.

Are the allegations in the petition sufficient to warrant the injunction? We think not. The grounds for the injunction are more properly a defense which should have been pleaded at the trial of the suit in the parish of St. Tammany.

This court has often held that an execution cannot be enjoined on grounds which might have been pleaded before judgment. 8 L. 101; 6 A. 282; 8 A. 489. In the case of *Monroe v. McMiken*, 8 N. S. 513, this court said "causes would never terminate, if injunctions could stop execution and try matters over again which might have been offered in defense before judgment was given."

The District Court of St. Helena parish could not entertain the action to annul the judgment of defendant, Forshay, rendered in the District Court of the parish of St. Tammany. Where judgment has been pronounced by a District Court no other District Court has jurisdiction to annul it. C. P. 608; 2 A. 493.

It is therefore ordered that the judgment appealed from be affirmed with costs.

NO. 2099.—MARTIN HANEY v. S. C. MANNING.

All contracts and transactions between parties in aid of the Confederate struggle in the late conflict between the United States and the so-called Confederate States, are contrary to good morals and public policy, and cannot be judicially enforced. In all such cases the parties engaged will be left where their conduct has placed them.

APPEAL from the Sixth Judicial District Court, parish of St. Helena, *Ellis, J. E. J. Ellis & T. C. W. Ellis* for plaintiff and appellee. *T. G. Davidson* and *E. F. Russell* for defendant and appellant.

TALIAFERRO, J. The plaintiff sues to recover from the defendant the value of services rendered to him during the latter part of December, 1863, and the greater part of the year 1864; for the use of two horses and a mule furnished by him for defendant's benefit, in the per-

Martin Haney v. S. C. Manning.

formance of the services stated, and for the value of a buggy loaned to defendant and never returned. The answer contains a general denial with the averment that the services alleged by plaintiff to have been performed by him for defendant were rendered in carrying on an illicit and illegal trade during the late war between parties residing within the opposite lines of the contending parties. He avers that plaintiff cannot recover upon his demand and prays judgment in his own behalf. The jury before whom the case was tried awarded a verdict of \$520 with interest, in favor of plaintiff, and defendant appeals.

The evidence abundantly shows that the declarations of the defendant however creditable to his candor, are true in point of fact.

The plaintiff in his petition avers "that in pursuance of his employment he was required to pass, repeatedly, near the lines of the contending forces of the United States and of the Confederate States, that he was exposed to imminent danger often times—that he was engaged within the parishes of St. Helena, Livingston and East Baton Rouge in the purchase of goods and cotton, the profits of which inured to said Manning," &c.

Edward Manning, son of the defendant, sworn as a witness says: "I know that in March, 1864, my father, S. C. Manning, entered into a contract with the so-called Confederate States Government for the purpose of supplying said government with arms, ammunition, medicine, clothing, &c., for which he was to receive, in return, cotton and permits and guards to transport said cotton to points near the Federal lines. In furtherance of this object and this *alone*, the following parties were employed in and for considerations hereafter mentioned." The witness then speaks of the conditions upon which one Andrews was engaged, and further on says: "The said Martin Haney (meaning defendant) and myself started to Magnolia to report. When near there we met S. C. Manning returning from Meridian, Mississippi, who stopped us and to whom we stated our object." Witness then details the conversation that ensued. Manning said: "I have been to Meridian, seen General S. D. Lee, and arranged all matters relative to the contract. He granted me many privileges in choosing my own men," &c. Mr. Haney then said: "Can't you get me one of these papers signed in my name relieving me from reporting to the board and to conscript officers. If you will do that for me I will work in this contract the same as Ned and Andrews are working." Manning told him "yes." "After Manning, the defendant, made a trip to Liberty, Mississippi, he delivered to J. M. Andrews, Martin Haney and myself each a passport through all outposts and pickets of the Confederate forces. These papers were used by us all more than once—by Mr. Haney for his own benefit, in trading at Bayou Barbara, at Parcut's, with corn delivered and salt and flour brought back in return. The buggy was borrowed with the free consent of Haney to be used in the contract above mentioned, and was lost by Manning on Amite river, where he was captured by Federal forces, and by which he lost his own horses, and valuable medicines, &c., that were in the buggy."

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Wilder, a witness, testifies that the defendant bought goods of him at Bayou Barbara for the plaintiff, and appends to his testimony bills of the goods sold to him. These bills sufficiently disclose the character of the traffic that was going on at "Bayou Barbara." Among the items are clothing, shoes, medicines, salt, coffee, whiskey, flour, hats, &c., &c.

This court has repeatedly announced that it will not entertain suits founded upon engagements involving a violation of law and in derogation of public morals. The plaintiff's action in this case, grounded as it is shown to be, on engagements and acts reprobated by law, must share the fate of its predecessors of the same character in this court.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the plaintiff's action be dismissed at his costs in both courts.

Rehearing refused.

No. 2125.—SUSAN T. FLYNN, Tutrix, et al. v. E. W. FLYNN.

Where a party plaintiff to a suit gets married while the suit is pending, the supplemental petition making her husband a party need not be served on the defendant.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana, Posey, J. *John McVea* for plaintiff and appellee. *W. F. Kernan* for defendant and appellant.

Howe, J. The plaintiffs sue upon a promissory note given by defendant as part of the purchase price of land, and claim the vendor's privilege. The defendant, residing in a different parish, claims in reconvention a large sum for board and lodging, &c., furnished the plaintiff's family.

Upon the trial, Sarah Flynn, one of the parties plaintiff, filed her supplemental petition averring that she had [since the institution of the suit as it appears] intermarried with Benjamin Smith, and asked to *continue* party plaintiff in the case "aided and authorized by her said husband, and adopting all the allegations originally made in said petition and praying for the same judgment."

It appears from the bill of exceptions, reserved by defendant, that the plaintiff's counsel thereupon moved to make the said Sarah and her husband parties plaintiff, and to proceed with the trial of the cause. The defendant objected to proceeding with the trial of the cause on the ground that the supplemental petition ought to be served, with citation, and the case continued. The court overruled the objection, and, proceeding with the trial, gave judgment in favor of plaintiff, as prayed for, and rejected the reconventional demand.

We do not think the court erred in its ruling. The minor was already a party plaintiff through her tutrix, but in consequence of her marriage,

 Susan T. Flynn, Tutor, et al., v. E. W. Flynn.

pendente lite, it became proper to put the fact on record and to join her husband as a party. This was done, as appears by the bill of exceptions. The amendment was formal. The substance of the plaintiffs' demand was in no way altered. In such a case we do not think it necessary to have the supplemental petition served with citation and the cause continued. 3 M. 393; 12 R. 138.

The reasoning used by this court in *Locquet's Heirs v. Pierce*, 5 L. 361, does not apply to this case.

Upon the merits, we do not feel authorized to disturb the judgment. The plaintiff's demand is practically admitted. The reconventional demand is vague in itself, and the evidence is contradictory. Under such circumstances the decision of the judge who heard the witnesses and rejected the claim will prevail.

It is therefore ordered and adjudged that the judgment appealed from be affirmed.

No. 2153.—D. C. ERNST et al. v. MARY MONTIGUDO, Appellant.

Plaintiff acquired title to a tract of land in the parish of East Feliciana, in 1849, and occupied it until 1862, when he left it in consequence of the operations of the war. In 1866 defendant entered upon it. In 1867 plaintiff brought a petitory action for the land and to recover rents, etc. Defendant in possession set up title founded on a Spanish grant, and a probate sale made in 1831, of a tract of land of seven hundred and twenty acres, alleging that the tract in controversy was included within that tract. The evidence shows that plaintiff proposed to buy defendant's claim, and that defendant refused to sell, but notified plaintiff that suit would be brought for the land. Suit never was brought. Under this state of facts it was held by the Court, that defendant, not having shown a better title than plaintiff, that the proposition to buy defendant's claim never having been accepted, nor any suit brought as threatened, was not a recognition of the claim, and that plaintiff must recover.

A PPEAL from the Fifth District Court of the parish of East Feliciana, Posey, J. *McVea & Kilbourn*, for Plaintiff and Appellee. *McVea & Hunter*, for Defendant and Appellant.

HOWELL, J. This is a petitory action to recover certain lands and their revenues, to which the defendant pleaded the general issue.

It is shown that F. C. Ernst, through whom plaintiffs claim, bought a tract of forty acres, described in the act of sale, from J. J. Freeman, on 2d July, 1845, and an adjoining tract of thirty acres from S. H. Cole on 11th February, 1847, which constitute the property in controversy; that said Ernst moved on the land with his family in 1849, and occupied it without interruption until his death in 1855; that his family remained there until December, 1862, when they were compelled to leave because of the fortifications erected by the Confederate forces around Port Hudson, and the operations of the war, by which all the buildings, fences and other improvements were destroyed; that in January, 1866, the defendant went upon the land, put up buildings, which she, as a witness, estimates at \$1500 or \$1600, and has since held possession. In her testimony, she says that, in 1859 and subsequently, F. C. Ernst offered to buy her claim, which she refused to sell, and notified him

B. C. Ernst et al. v. Mary Montigudo, Appellant.

that she intended to sue for the land; that her said claim rested on a Spanish grant and a probate sale made on the 29th November, 1831, by John Reid, executor of Sarah Rowell, to D. J. Green (first husband of defendant) and R. W. Walker, of a tract of seven hundred and twenty arpents, which, she says, includes the land in dispute, and that she derived her title from her said husband, who left a son now living. This act of sale is in evidence, and it shows that the succession of Sarah Rowell "does not warrant the title of two hundred and ninety-eight acres of the aforesaid tract of land, sold by the sheriff for taxes."

To rebut the effect of this evidence, the plaintiffs introduced the record of the suit of D. J. Green v. His Creditors, instituted in August, 1839, from the proofs of which before us, it does not appear that the insolvent proceedings are yet closed.

We agree with the District Judge, that the title of the plaintiffs is not invalidated by the evidence for the defense. The proposition of F. C. Ernst to purchase the *claim* of defendant, stated as vaguely as it is, does not admit the reality of the claim, particularly as the defendant never instituted any legal proceedings to recover, as threatened. Her claim seems to be stale and without real foundation in law.

There are several bills of exceptions in the record, but as we have not been called on to do so, we will not pass upon them.

Judgment affirmed.

No. 2110.—A. C. TAYLOR AND HUSBAND v. BOEDICKER & BADENHAUSEN, and S. D. MOODY.

When a want of identity of the note with the act of mortgage by which it is secured is shown to exist, the holder cannot proceed by executory process to seize and sell the property mortgaged. *Ricks v. Birnstein*, 19 An. 141.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana, *Posey, J. McVea & Hunter* for appellees. *Kernan & Lyons* for appellants.

HOWELL, J. This is an appeal by a third possessor from an order of seizure and sale, in which the only question presented, as stated by counsel for appellees, is, "whether the evidence before the District Judge was sufficient to authorize the issuance of the order of seizure." The error assigned is that the note annexed to the petition does not correspond with and is not the one described in the act of sale, in this:

First—"The note sued on is a joint and several note, and the other note described in the act is a joint note.

Second—"The note sued on is signed by Emil Boedicker and Julius G. Badenhause, *in solido*, and the note described in the act is signed by Emil Boedicker, Julius G. Badenhause and Charles H. Allyn, jointly."

These discrepancies are manifest, and according to the settled jurisprudence of the State the evidence was not sufficient to authorize the order.

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A. C. Taylor and Husband v. Boedicker & Badenhausen, and S. D. Moody.

The three parties last above named, were the vendees of the plaintiffs, and the act of sale declares that they gave their joint note for the sum set forth in the petition, and they are the vendors of the appellant, who assumed to pay the balance stated to be due on the said joint note. The one annexed to the petition is a joint and several note signed by only two of said parties. There is therefore a want of identity between the said note and the one described in the authentic act, and the judge erred in granting the order. See the case of *Ricks v. Birnstein*, 19 An. 141, and authorities there cited.

It is therefore adjudged and decreed that the order of seizure and sale issued in this case be set aside and annulled, and that plaintiffs pay costs in both courts.

No. 2131.—LAFITTE, DUFILHOE & CO. v. ACKLEY PERKINS.

In order to bind the drawer or indorser of a protested draft, notice must be directed to his postoffice. Notice sent to another postoffice than that of his domicile will not avail. A party will not be permitted to prove what he has not alleged in his petition.

APPEAL from the Seventh District Court, parish of West Feliciana, *Miller, J. Winter & Butler* for appellant. *Wickliffe & Fisher* for appellee.

WILY, J. In June, 1865, the defendant drew his draft on J. & H. Perkins, of New Orleans, payable on first November following. It was accepted by the drawees; it was again presented for payment and protested for non-payment.

On the trial the testimony showed that the notice of protest was sent to the postoffice at Baton Rouge, and not to the defendant's postoffice at Bayou Sara.

There was judgment for defendant, dismissing the suit, and plaintiffs have appealed.

The evidence clearly shows that the conditional obligation herein declared upon was not rendered unconditional by notice of protest not being duly served on the drawer of the draft.

Our attention is called to a bill of exception taken by the plaintiffs to the ruling of the court in not permitting them to compel the defendant to answer their interrogatory inquiring whether the defendant had funds in the hands of the drawees at the time the draft was drawn, and at the time it was protested for non-payment.

We think the District Judge did not err in refusing the testimony sought by plaintiffs because they had made in their petition no allegations to warrant the same. It is well settled that a petitioner cannot be permitted to prove more than he has alleged.

We see no error in the judgment.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

Mrs. E. A. Myers and Husband v. the Sheriff et. al.

No. 2119.—MRS. E. A. MYERS AND HUSBAND v. THE SHERIFF et. al.

When the seizing creditor of the husband is confronted by the wife's claim to the property seized, founded on a judgment of separation of property, and the authentic act of sale and purchase of the property seized, from a third party to the wife, made after the judgment of separation and prior to the date of seizure, the creditor, to maintain the seizure, must allege and show fraud and simulation in obtaining the judgment of separation.

APPEAL from the Fifth District Court, parish of East Feliciana, *Posey, J. Kernan & Lyons* and *F. Hardesty* for plaintiffs and appellees. *Race, Foster & E. T. Merrick* and *Oross & Horan* for defendants and appellants.

HOWELL, J. The plaintiff, Mrs. Myers, as owner, by purchase on the eighth May, 1866, enjoined the sale of certain land seized on the nineteenth day of October, 1867, under an execution against her husband, and asked to be declared the legal owner thereof. The defendants pleaded a general denial, admitting the seizure, "which they justify and hold to be legal and proper. They specially deny that plaintiff has any legal judgment against her husband, but aver that the pretended judgment relied on by her was obtained, virtually on his confession and by collusion with him. That he was not in such insolvent circumstances as to justify judgment, and the plaintiffs had no claims against him. That the said judgment is invalid and has no legal effect," and they pray for the dissolution of the injunction and for damages.

There was judgment in favor of plaintiff and the defendants appealed.

The proof, as admitted by defendant's counsel, establishes the correctness of the amount of Mrs. Myer's judgment against her husband, and we think also his embarrassed condition at the time; and as the sale from the husband to Wm. Myers, in 1859, and that by the latter to the plaintiff, Mrs. Myers, in 1866, are not attacked as simulated or in any other manner, we do not feel authorized to infer from the facts and circumstances developed in the record, that the property seized is really the property of the judgment debtor. The wife here was not, as in the case of *Campbell v. Bell*, 12 A. 193, relied on by defendants, required by the pleadings to establish the validity of her purchase from Wm. Myers and show that she paid for said property with her paraphernal funds or that, after the dissolution of the community, she had a separate industry by which to realize the money paid. It is true that most of her moneyed judgment against her husband seems to have been satisfied prior to her purchase of the property in controversy, but it is not impossible that she may have been able, if called on, to show that she had other means. The evidence in this respect, which was admissible on the question of the husband's embarrassed condition, raised by the answer, at most only creates a suspicion that the husband may have furnished her with the money which the authentic act of sale in evidence declares she paid to the vendor, whose unassailed title is also in the record.

However unwilling this court may be to sanction any devices or proceedings intended to cover up or screen property from the pursuit of creditors, we must adhere to the ordinary rules of pleading and not presume fraud or simulation when not charged.

Judgment affirmed.

Henry Schorten v. H. C. Davis and Brother.

No. 2140.—HENRY SCHORTEN v. H. C. DAVIS and BROTHER.

To entitle the creditor to the remedy by attachment against a resident debtor, it must be shown that he is about leaving the State permanently:

A and B were engaged as partners in the planting business in 1866. C, a merchant, furnished their supplies. In 1867, they continued their account with C, who continued to supply them as partners. Held—That they were bound to C., as ordinary partners, for the supplies furnished, notwithstanding they may have dissolved the partnership as between themselves.

A PPEAL from the Fifth Judicial District Court, parish of East Feliciana, *Posey, J. Wedge & Lyons*, for plaintiff and appellant. *McVea & Hunter*, for defendants and appellees.

HOWELL, J. This is an attachment suit by a merchant, in the town of Baton Rouge, against the defendants, as agricultural partners in the parish of East Feliciana, for plantation supplies furnished. The defendants severed in their defense. The case was tried before a jury, who found a verdict dissolving the attachment, releasing John Davis from liability, making H. C. Davis responsible for the entire debt, and condemning plaintiff to pay all costs; and from a judgment thereon the plaintiff has appealed.

Two questions are presented by him for our consideration:

1. Was the attachment properly sued out?
2. Are the defendants liable as ordinary partners?

I. The facts do not, in our opinion, authorize the writ of attachment. There is no proof of any intention at the time of leaving the State permanently. On the contrary, they were making preparations for planting another crop.

II. As to the question of partnership, it seems that they had raised a crop as partners in 1866, and obtained supplies from plaintiff, for which a considerable balance remained unpaid, which constituted the first item of the account sued on; that on second February, 1867, they entered into a written agreement, by which H. C. Davis agreed to pay John Davis \$250 to labor and superintend the farm of the former during the year; that plaintiff continued as usual to furnish supplies, charging them in his journal to H. C. Davis and Brother; that they sometimes went together with a wagon and sometimes separately to get the supplies; but it does not appear that plaintiff was ever notified of the dissolution of the partnership. On the contrary, he, his clerk and neighboring merchants seem to have considered the defendants still to be partners, and plaintiff dealt with them as such.

Under these circumstances he was clearly justified in believing them to be partners, and they are both as such to him whatever may have been the agreement between themselves. See Story on Partnership, §§ 54, 103; 4 R. 300; 5 L. 409; 14 A. 529; 18 A. 631.

It is therefore ordered that the judgment appealed from be reversed and the verdict set aside; and proceeding to give such judgment as

Henry Schorten v. H. C. Davis and Brother.

should have been rendered, it is ordered that there be judgment against plaintiff dissolving the attachment herein at his costs; and that he recover of defendants jointly the sum of \$1040 51-100, with legal interest from December second, 1867, with costs of the main action in the lower court, and the costs of appeal.

No. 2060.—G. INGRAM v. T. DOHERTY, and T. DOHERTY v. G. INGRAM.
(consolidated cases.)

The appeal from a judgment of the District Court involving the right of office, returnable before the Supreme Court in New Orleans, will be dismissed on motion, if the requirements of Section 13 of the Act of 1866, page 154, have not been observed, in not making the appeal returnable in ten days after the judgment of the lower court.

APPEAL from the Sixth District Court, parish of St. Tammany. *Ellis, J. Thompson & Penn* and *A. & M. Voorhies* for plaintiff and appellant. *A. Hennen* and *Ellis & Walker* for defendant and appellee.

HOWELL, J. In this controversy the only question involved, by agreement of parties, is the right to the office of sheriff of the parish of St. Tammany.

A motion is made to dismiss the appeal because, by the fault of the appellant it was not made returnable, nor brought up "in ten days after the judgment of the lower court," as provided by the thirteenth section of the act of 1866, p. 154.

The judgment was rendered on the thirtieth November, 1868, and on the same day a written motion, signed by appellant's counsel, was presented and allowed, granting a suspensive appeal and returnable to this court, "on or before the fourth Monday of February, 1869," as set forth in said motion and the transcript was filed on Saturday, thirteenth February, 1869—the fourth Monday being the twenty-second day of said month.

The appellant cites the case of *Trimble v. Britcha*, 10 A. 778, as an authority to relieve him of the imputation of error in the order of appeal. It is there said: "as there is nothing in the record to show that the appellant *suggested* any particular return day, we must consider the order of appeal as the act of the judge, and that it was not one of the errors which, under the statute, might be imputable to the appellant." Here a day was suggested by the appellant, and then under the phraseology of the order as asked by him (being in the alternative), it may have been possible for him to have brought up the appeal within the ten days prescribed in such cases. Be this as it may, the return day having been fixed as demanded by the appellant, we must conclude that the error is imputable to him.

Appeal dismissed with costs.

Rehearing refused.

State of Louisiana, ex rel. T. Doherty, v. G. Ingram.

No. 2060.—STATE OF LOUISIANA, ex rel. T. DOHERTY v. G. INGRAM.

HOWE, J. This proceeding is a part or branch of the controversy between these parties, in relation to the office of sheriff and which we have just disposed of by dismissing the appeal, and as the judgment therein, which becomes final by such dismissal, settles the controversy in favor of the relator herein, who is appellee in both appeals, it is unnecessary to examine this cause on its merits.

It necessarily follows the decision in the consolidated cases giving the office of sheriff to the appellee, who is thereby entitled to the possession of the archives of said office, the matter in dispute herein.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 2107.—R. H. DRAUGHAN, Administrator, v. JANE WHITE AND JOHN COLLINS.

A receipt given for money is not conclusive and may be explained by parol testimony.

Payment to the administrator in Confederate treasury notes of a debt due to the estate will not shield the debtor from liability.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Poey, J. McVea & Hunter* for plaintiff and appellee. *W. F. Kernan* for defendant and appellant.

HOWE, J. This suit was brought on two promissory notes given at a probate sale made in the succession of Evander White, of which the plaintiff was administrator. The court below gave judgment in favor of the plaintiff for the amount of the note for \$445 60, the consideration of which appears to have been lawful, rejecting the claim upon the other note which had been given as the price of a slave, and the defendant, Mrs. White, has appealed.

The defense pleaded is that in August, 1863, Mrs. White had a full settlement with plaintiff and paid him a balance of \$937 08, in full of amount due on these notes and another given at the same sale, and the receipt of the administrator is annexed to the answer.

Upon the trial it was clearly proved that the amount thus receipted for was paid entirely in what were known as Confederate treasury notes. The obligations in suit were not given up because they were not then in possession of the administrator. The defendants reserved a bill of exceptions to the admission of testimony on this point on the ground that the plaintiff who was the witness "could not contradict his own written acknowledgment, and that no witness could be heard to prove that he had violated the law and given aid and comfort to rebels in arms by giving currency to their so-called Confederate treasury notes."

R. H. Draughan, Administrator, v. Jane White and John Collins.

The objection was properly overruled. A receipt for money is not conclusive between the parties, but is open to explanation by parol, especially as to consideration (5 A. 238, 408; 14 A. 276), and we know of no rule of law which forbids the plaintiff from disclosing the real character of the transaction. The rule *nemo allegans*, etc., has never, we believe, been properly applied to a case of this sort. The alleged payment of August, 1863, was not a payment, and we therefore see no error in the judgment.

For the reasons given, it is ordered and adjudged that the judgment appealed from be affirmed with costs.

NO. 2094.—WILLIAM F. PALMER v. PHILIP S. PETTY.

A purchased at probate sale a lot of untanned hides then in the tan vats which were on the plantation, together with a lot of tan bark and the tools necessary to finish tanning out the leather. B purchased the plantation at the probate sale, on which the tan yard is situated, who brings this suit against A for the use of the tan yard, etc. Held, That—inasmuch as no contract or agreement between A and B is shown about the use of the tan yard, and the *procès verbal* of the sale shows that A purchased the leather then in the tan, together with the tools and bark, he is entitled to the use of the tan yard free of costs for tanning out the leather.

A PPEAL from the Seventh Judicial District Court, Parish of West Feliciana. *Cooley, J. Powell*, for plaintiff. *Wickliffe & Miller*, for defendant.

TALIAFERRO, J. In the latter part of the year 1865, the plaintiff purchased at a probate sale of the succession of G. B. and M. E. Petty, deceased, the plantation belonging to the estate, and the defendant bought a large quantity of hides in the tan vats of the tannery on the place. These hides were undergoing the process of tanning at the time of the purchase, and the defendant continued the operation, using the same vats for the purpose. Nearly a year seems to have elapsed before all the hides were converted into leather and removed. The plaintiff sued the defendant for the use of the tannery, and also for board during the time he was occupied with the work; his entire claim being stated at six hundred and thirty dollars with interest. In the lower court this claim was rejected, and judgment rendered in favor of the defendant. The plaintiff has appealed.

A review of this case inclines us to coincide with the judge *a quo* in the opinion that the plaintiff has failed to establish his claim. It is not shown that there was any definite contract or understanding entered into between the parties on the subject. The only evidence on the record going to show that the defendant agreed to pay anything for the use of the vats, is the testimony of the plaintiff himself, and that is vague and indeterminate. He says: "There was no stipulated price between the plaintiff and defendant for the use of the tan yard, but defendant expressed himself as willing to pay whatever was right. I rather think I called on the defendant several times to know what price he was going to pay for the use of the tan yard, or rather that he noti-

William F. Palmer v. Philip S. Petty.

fed the defendant that he could not have the use of the tan yard any longer until the price was agreed upon. I did call upon him more than once. There was no agreement as to the price, but defendant was willing to leave it to arbitration."

"At the winding up, and after he had got through with the use of the yard, defendant refused to leave it to arbitration, and said that it was not a case that admitted of arbitration."

The defendant, in his testimony, states that he "purchased the leather sold at the succession sale of G. B. and E. Petty, deceased, and also the bark and tools, with the intention of tanning out and finishing the leather in the yard. Some time after the sale, applied to Dr. Palmer to take his dinner there when witness was there, for which he promised to pay him. He rather declined receiving anything, inasmuch as he and witness were somewhat connected by marriage. Witness insisted on paying, and then and there gave him three or four dollars for the meals he had taken up to that time, and expressed his intention of paying for the meals he should take afterwards. Witness, while there, made his (Palmer's) wife a present of some bacon and sugar."

It appears that the defendant resided some six or seven miles from the tan yard, and was in the habit of going there from home to attend to his leather, and of returning at night, never remaining all night at Palmer's. He was during this period also occupied in attending to the finishing some leather at Dr. Norwood's tan yard in the neighborhood.

It appears that the defendant offered to prove by the sheriff who made the probate sale, and by two other witnesses, that the leather was sold with the express agreement that the purchaser should have the privilege of the tan yard to complete the tanning and finishing off of the leather. This evidence was refused, and the defendant reserved his bill of exceptions. This we do not deem it necessary to pass upon. From the *proces verbal* of the sale it appears that the defendant purchased about seven hundred hides then in the vats, at the cost of about \$1300, a lot of tan bark in the woods, and some other things necessary in tanning. Under the circumstances, and all the facts disclosed, we think it reasonable to suppose that the defendant would not have purchased the hides without being allowed the use of the tan yard to complete the operation of tanning and converting them into leather.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 1963.—STATE OF LOUISIANA, ex rel. WILLIAM GEORGE, et als. v. WILLIAM S. MOUNT, City Treasurer.

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The law of 1856, section 131, page 136, exempting the city of New Orleans from giving bond in litigations to which she is a party does not apply to the Treasurer or other officers of the city. The statute exempting the corporation from giving bond is an exceptional one and cannot be extended to other parties than those mentioned.

APPEAL from the Fifth District Court for the parish of Orleans.
 Leammont, J. J. Hawkins and E. Filleul, for relators and appellees,
 H. J. Leovy, City Attorney, for defendant and appellant.

State of Louisiana, ex rel. William George, et als. v. William S. Mount, City Treasurer.

On motion of J. Hawkins and E. Filleul, of counsel for relators, it is ordered that the defendant do show cause on Monday, the twenty-fifth January, 1869, why the appeal in this case should not be dismissed on the ground that the appellant has furnished no bond of appeal according to law.

HOWELL, J. A motion is made by the relators to dismiss this appeal on the ground that no appeal bond has been furnished by the appellant.

In reply it is contended that the city of New Orleans is the real defendant and party in interest, and is by law exempted from giving an appeal bond.

The proceeding is a mandamus directing the defendant to fulfill a duty required of him by law as Treasurer of the city of New Orleans, by paying certain warrants in favor of and held by the relators, and he has appealed from a judgment making the writ peremptory. The city, not having been cited through its proper officer, is not a party to the suit. We know of no law authorizing the Treasurer to represent the corporation in a litigation. The exemption in favor of the city, being in derogation of a general law, cannot be extended to other parties, even though they be officers of the corporation.

It is therefore ordered that the appeal herein be dismissed at appellant's cost.

Rehearing refused.

NO. 2130.—STATE OF LOUISIANA on the relation of J. S. SIMONDS v. THE JUDGE OF THE SEVENTH DISTRICT COURT, parish of Orleans, et als.

The Judge of the District Court is competent to determine the sufficiency of the security on an appeal bond after the appeal has been taken and filed in the Supreme Court, and if he finds the bond not such as the law requires he may order execution to issue, notwithstanding the appeal.

Where the evidence shows that the security on the appeal bond is not good and solvent as required by law, the Supreme Court will not issue a writ of prohibition restraining the Judge *a quo* from ordering execution to issue pending the appeal.

A PPEAL from the Seventh District Court of the parish of Orleans.
Collens, J. Bentinick Egan, for relator, *Breaux & Fenner*, of counsel.

WYLY, J. The relator took a suspensive appeal from the judgment recovered against him by Bogart & Oakley. The appeal was subsequently set aside on motion in the court *a quo* on the ground that the bond was not such as the law requires, the surety not being good and solvent.

The relator then applied for and obtained a writ of prohibition restraining the Judge, the Sheriff and Bogart & Oakley from executing said judgment.

The District Judge answered, averring that he had jurisdiction to entertain the motion and determine the sufficiency of the appeal bond;

State of Louisiana on the relation of *J. S. Simonds v. The Judge of the Seventh District Court, Parish of Orleans, et al.*

that on the trial thereof the solvency of the surety on the bond was not satisfactorily established; that the appellant had not complied with the condition upon which the suspensive appeal was granted, that is to say, he had not given a good and solvent surety on the bond.

The District Judge had the authority to test the solvency of the surety on the appeal bond.

We have carefully examined the evidence on which the Judge acted in determining the surety insufficient, and are of opinion that he did not err.

The certificate of mortgages adduced on the trial showed that the surety, *J. Morgan Hall*, is not good and solvent, his property being mortgaged for amounts largely exceeding the value thereof.

The relator failed, in our opinion, to establish that he had given such solvent security on his appeal bond as the law requires.

It is therefore ordered that the writ of prohibition herein granted be set aside and the petition be dismissed at the costs of the relator.

No. 2127.—*AUGUST BERNSTEIN v. EDWARD RICKS.*

The interruption of prescription may be proved by parol testimony.

A PPEAL from Sixth District Court, parish of St. Helena. *Ellis, J. E. J. Ellis*, for plaintiff and appellee, *S. E. Hunter* and *W. A. Perrin*, for defendant and appellant.

WYLY, J. The defendant has appealed from a judgment recovered against him by plaintiff on a note which matured second June, 1861. The citation was not served till twentieth June, 1866. The defense is the prescription of five years.

Plaintiff introduced parol testimony to prove an interruption of prescription, and the defendant took a bill of exceptions thereto. The evidence was properly received. The acknowledgment of a debt before prescription accrues can be established by parol evidence. The evidence is sufficient to satisfy us that prescription was interrupted, and that the plea is not well taken. It is therefore ordered that the judgment appealed from be affirmed with costs.

William R. Wimbish v. Joseph J. Wade and C. E. Percy.

No. 2092.—WILLIAM R. WIMBISH v. JOSEPH J. WADE and C. E. PERCY.

Where a party has purchased a tract of land and executed his promissory note for the price, and afterwards takes up the note by giving his draft for the payment thereof with full knowledge of the condition of his title, he cannot set up in defense to a suit against him as drawer of the draft that the title to the land is defective or imperfect. The attorney of record is not competent to make the necessary affidavit to obtain a trial by jury in a suit on a promissory note, where it is shown that the party resides in the parish and is within the limits of the parish at the time.

A PPEAL from the Seventh District Court, Parish of West Feliciana. *Miller, J. Samuel J. Powell*, for appellant. *Winter & Butler*, for appellees.

WYLY, J. Plaintiff sued the drawer of a draft, Joseph J. Wade, and the endorser thereof, Charles E. Percy, after the same had been dishonored by the drawees and duly protested.

The defendant, Percy, pleaded the general issue.

The defendant, Wade, after making a general denial, averred "that the draft sued on was given the payee thereof, Charles E. Percy, on account of certain notes of this respondent in the purchase from him of a certain tract of land in the parish of West Feliciana. * * That at the time of said sale said Percy was and still is without title to the whole or a portion of said land, and that in said act of sale it was expressly stipulated that this respondent should have the right to withhold payment of said notes until his titles to said land should be made perfect and complete; that said draft was given with the express understanding that said titles were to be completed and perfected, which have never been done by said Percy, nor is it now within his power to do so; that by reason of the premises the consideration of said draft, if it ever had any, has utterly and entirely failed. That plaintiff, W. R. Wimbish, was well aware at the time he received said draft from said Percy, of the consideration thereof, as above set forth; of the stipulations contained in said act of sale, and that said Percy had never completed the titles of respondent, as he was bound to do, and took the same subject to all the equitable and legal defenses respondent might urge against it. That if he was ever liable on said draft, which is still denied, he has been discharged from all such liability by the laches of the holder."

On the trial there was judgment for plaintiff against the defendant, Percy, the endorser of the draft, and plaintiff's action was dismissed as to the defendant, Wade, the drawer of the draft. Plaintiff has appealed.

It appears that James R. Wimbish sold a tract of land to Charles E. Percy, the titles to which were not complete, and that Percy retained part of the price till the titles might be perfected; it also appears that

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the said Percy afterwards sold this land to the defendant, Wade, with the stipulation that Wade was to have the privilege of retaining the price till the titles to him were perfected; it also appears that Percy instituted suit against the plaintiff as administrator of the succession of James R. Wimbish, who had died in the mean time, to compel the said administrator to complete the title, and the Court ordered the transfer of the title to be made upon Percy paying him a certain sum, being the balance due by said Percy to said vendor. Wade then came forward and offered to pay this sum to aid in perfecting the titles. He gave his note to Percy for the required amount, and Percy endorsed it and transferred it to plaintiff, and thereupon received the deed perfecting the title from the estate of James R. Wimbish. The defendant Wade subsequently gave the draft sued on in lieu of the note making it payable to Percy, and Percy immediately endorsing it over to plaintiff.

The draft was protested for non-payment, and proper notice given to both Percy and Wade. We have carefully considered the evidence, and are of opinion that the district judge erred in dismissing plaintiff's action as to Wade. We think he should be held liable as drawer of the draft. It is true in purchasing the land from Percy he reserved the privilege of retaining the price till his titles might be perfected; and it is true that the plaintiff was aware of the defects in the title. But still it appears that in pursuance of an order of court, the plaintiff, as administrator of the succession of James R. Wimbish, perfected the titles by a deed to Percy, the vendor of Wade, and accepted from Percy the note of Wade for the balance due said estate.

Wade subsequently took up this note and gave his draft in lieu thereof, with a full knowledge of the titles and of the defects therein, if such existed. If he had the privilege of retaining the price till the titles were completed, we presume when he gave the draft sued on he considered his titles satisfactory. It matters not what defects there may be in the titles, or what reservations he may have made in the deed from Percy, the defendant Wade voluntarily came forward and assumed the indebtedness of his vendor on the land by giving his note; he afterwards, with full knowledge of the condition of his titles, took up this note and drew the draft sued upon. That conditional obligation has been regularly converted into an unconditional one by proper service of the notice of dishonor upon the drawer, Wade, and we think he should be held liable.

The objection that the district judge erred in rejecting the application for trial by jury because the affidavit was made by Wade's attorney instead of Wade, who was in the parish at the time, but absent from the Court House, is not well founded; the defendant Wade should have been at the Court House on the day fixed for the trial; he absented himself at his peril. The affidavit made by his counsel is not a compliance with the law. 9 An. 129; 16 La. 577.

William R. Wimblish v. Joseph J. Wade and C. E. Perry.

It is therefore ordered that the judgment appealed from be affirmed as to the defendant Charles E. Percy and that it be avoided and annulled as to the defendant Joseph J. Wade; and it is now ordered that plaintiff recover judgment against him *in solido* with the defendant Percy; that the costs of this appeal be paid by the defendant Wade and the costs of the lower court be paid by the defendants *in solido*.

No. 430.—WILLIAM C. LYTLE v. P. V. WHICHER, et al.

Payment of a promissory note cannot be judicially enforced where the consideration is shown to be the price of a sale of slaves. 19 An. 234, 309, 519.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *McVea, J. Wickliffe & Packwood*, for plaintiff and appellee. *Collins & Leake*, for defendants and appellants.

Howe, J. It appears by the record in this case that the note sued on was given in part payment for certain slaves. In accordance, therefore, with the decisions of our predecessors, which have become the settled jurisprudence of the State, the judgment from which the defendants have appealed must be set aside.

Wainwright v. Bridge, 19 An. 234; *Austin v. Sandel*, 19 An. 309; *Halley v. Hoeffner*, 19 An. 519.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed, and that there be judgment in favor of defendants with costs in both courts.

No. 2145.—HUGH BROWN, Administrator, v. WILLIAM SADLER.

Questions of fraud and the credibility of witnesses are peculiarly within the province of the jury, and their verdict will not be disturbed unless it is manifestly erroneous. 9 R. 360.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. Bowman & Delee and Cross & Hardee* for plaintiff and appellant. *John McVea* for defendant and appellee.

Howe, J. This case comes before this court for the third time. The facts are fully detailed in the decisions rendered by our predecessors, 13 An. p. 205, and 16 An. p. 206. It will be seen by a reference to the latter report that a judgment in favor of defendant was reversed and the cause remanded, with the task imposed on the defendant of sustaining his plea of payment by other evidence than "the production of the notes with the name of Ann Gair thereon erased." Upon the new trial thus ordered, which was had before a jury, the defendant introduced upon this point, without objection on the part of the plaintiff, testimony of himself and of another witness to show that the notes sought to be enforced in this case were paid at the time of the sale to him and

Hugh Brown, Administrator, v. William Sadler.

given up to him with the maker's name erased, and that the money paid went into the hands of the administratrix, Mrs. Catharine Gair. The jury found a verdict in favor of defendant, and we do not feel authorized to disturb it. Questions of fraud and of the credibility of witnesses are peculiarly within the province of the jury of the vicinage, and their verdict ought to stand unless manifestly erroneous. *Sheldon v. New Orleans Canal Company*, 9 Rob. 36.

It is therefore ordered and adjudged that the judgment appealed from by plaintiff be affirmed with costs.

21	183
117	375

No. 2134.—In the Matter of the Minors MARY M., WILLIAM P. and C. B. SMITH. J. W. SMITH, Tutor.

A third party taking an appeal from a judgment homologating a tutor's account must make all the parties who have an interest in maintaining the judgment parties to the appeal, otherwise the appeal will be dismissed.

APPEAL from the Parish Court of the parish of West Feliciana, *Riley, J. W. D. Winter* for appellant. *Collins & Leake* for appellees.

HOWELL, J. W. S. Peterkin, a third party, has appealed by petition from a judgment of the Parish Court of West Feliciana, homologating the account filed by J. W. Smith, tutor, of his tutorship of his children, Mary M., Wm. P. and Courtland B. Smith, issue of his marriage with his deceased wife, Mrs. Rebecca G. Smith.

A motion to dismiss is based on the grounds:

First—That Collins & Leake and C. B. Collins, whose accounts were allowed by the judgment of homologation, and who have an interest in maintaining said judgment, have not been cited.

Second—That an appeal should not be allowed to third parties when other evidence than is included in the record is necessary.

The first ground is well taken; for if the judgment be reversed, the claims of Collins & Leake and of C. B. Collins may be opposed and rejected or reduced. The fact, as alleged, that they have been paid, does not necessarily conclude parties interested from contesting the correctness of the amounts so paid. They have an interest in maintaining the judgment as rendered. See succession of McCausland recently decided, also succession of Weigel.

Appeal dismissed at the costs of appellant.

Rehearing refused.

No. 1395.—ERNEST MOREL, Testamentary Executor, v. L. SURGI et al.

Where the legatee or his assignee has obtained possession of money and assets of the succession in violation of law, and the executor brings suit to recover the same for the benefit of the estate, the legatee cannot set up in defense that his possession was in payment of the legacy.

A PPEAL from the Second District Court of New Orleans, *Thomas, J. Henry C. Miller* for defendant and appellant. *L. Castera* for plaintiff and appellee.

TALIAFERRO, J. The plaintiff in his representative capacity sues L. Surgi and another for the sum of twenty-five hundred dollars and for the recovery of sundry promissory notes, all of which, he alleges, were taken out of his possession as executor, fraudulently by defendants, and by their use of false representations and charges to intimidate and overreach him.

There was no answer filed in the case and final judgment was rendered in default in conformity with the prayer of the petition.

It seems that the plaintiff as executor of the estate of Rosaline Perche, who died in 1859, proceeded under his appointment to sell a part of the property, to discharge the debts and pay the legacies—of which there were two—one to Jean Abelard and another to his sister Eugenie Satout, the amount given to each being \$3,000. In May, 1860, he filed a provisional account, which was homologated. This account shows that only the sum of \$118 34 remained to be applied in part payment of the legacies. In October, 1861, the legatees assigned their interest in the succession to Louis Surgi, one of the defendants in this case, who from that time figures prominently in the litigation that subsequently arose. Rules were taken upon the executor for the production of his bank book, and to compel him to sell the remaining property of the succession. These rules seem to have been complied with. After the occupation of New Orleans by the Federal forces, provost marshal courts were established in the city. Before one of these courts, presided over by Judge Bell, the defendant Surgi, in November, 1862, made an affidavit in which he purported to detail, at much length, the proceedings of the executor in his administration of the estate, charging him with resistance to his claims, with delay and chicanery, and concludes by saying “that under all these circumstances affiant verily believes that Ernest Morel has embezzled and appropriated to his own use the money and assets or part of the money and assets of the aforesaid succession of Rosaline Perche, wife of H. Bistes, which is an offense provided for by our criminal laws.”

The plaintiff avers that through fear of an illegal arrest and being drawn into court upon a groundless charge of being guilty of a criminal offense, he delivered to Surgi the entire assets of the estate, consisting of—

Cash	\$2,545 25
Mortgage notes of Planchard.....	766 66
Notes of Freret.....	916 66
A note of \$500 endorsed by Fortier.....	500 00
	<hr/>
	\$4,728 57

Ernest Morel, Testamentary Executor, v. L. Surgi et al.

Surgi thereupon instituted suits upon the notes of Planchard and Freret. They excepted to the proceedings against them on the ground that he was not the legal owner of the notes and could not stand in judgment. The exceptions were sustained. In January, 1865, Surgi took a rule in the Second District Court against the executor to show cause why he should not be ordered to pay over the balance due on the legacies and to reimburse him the expenses incurred in prosecuting the suits against debtors of the estate. The executor excepted, and no final action seems to have been taken on the rule.

On the eighth of February, 1865, the executor filed his final account, and on the twenty-fifth of that month it was homologated so far as it was not opposed. Several oppositions were filed; one by Surgi, another by Poutz, a creditor, and a third by Bistes, husband of the testatrix, claiming the marital portion. These oppositions were disposed of, and the account finally homologated on the thirtieth November following. By this judgment there was reserved to the executor all his rights against L. Surgi, one of the opponents, to compel him to refund any money he may have received arising out of the succession of Mrs. Perche.

We see no error in the judgment of the lower court. It is shown by the proceedings had upon the final account, that upon the opposition of Poutz, a mortgage creditor for \$1740, with interest and costs, and on that of Bistes, the surviving husband, claiming the marital portion, the court sustained these claims and ordered the latter to be paid over all other claims except those of creditors, and by preference and priority, over the claims of the legatees. The order homologating this account was rendered on the thirtieth of November, 1865, and as it appears, was never appealed from, and is therefore final. The pretense that the assets of the succession extorted by indirection from the executor, was a payment made upon the legacies, can receive no sanction from this court.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 2093.—JOSEPH LALLANDE v. IMMER U. BALL.

Where damages are claimed on a reconventional demand, the evidence must fix the amount with certainty and clearness.

APPEAL from the Seventh District Court, parish of West Feliciana.
Miller, J. S. J. Powell, for plaintiff and appellant. *Collins & Leake*, for defendant and appellee.

HOWELL, J. This suit was before this court in March, 1868, and is reported in 20 A. 194, where the material facts are stated. This appeal is taken by plaintiff from a judgment allowing \$1700 damages on the reconventional demand, as resulting from the purchase and erection of a saw mill, and the cost of lumber used in building necessary cabins on a plantation, for which the note sued on was given in part payment.

Joseph Lallande v. Immer U. Ball.

The defendant has asked that the amount which is credited on the judgment on the said note, be increased to \$2100.

Conceding defendant's right to recover, under the pleadings herein, the damages allowed (which we do not consider definitively settled in the former opinion and decree of this court and upon which we express no opinion), the evidence does not entitle him to the sum fixed by the judgment nor to any particular sum. It is very clear that he is not entitled to the price paid for the saw mill, which the testimony shows was erected long after he was informed by some third person that the "swamp tract" was not included in his purchase, and which is still on his plantation. The fact that "he has tried to dispose of it, but has found no sale," does not prove that it has no value. Nor should he be allowed the price paid for lumber used in building the cabins, for had he gotten it on the swamp tract as he expected, with the hands employed by him, it would have cost him something, and there is nothing in the record to show such cost, which should be deducted from the price or value of the lumber.

Such damages, *if allowable*, should be proven with some certainty.

It is therefore ordered that so much of the judgment appealed from as allows defendant seventeen hundred dollars damages on his reconventional demand, as set forth in said judgment, be reversed, and that said demand, as to the said specified damages, be dismissed.

It is further ordered that in all other particulars said judgment be affirmed, with costs in both courts.

NO. 2095.—STATE OF LOUISIANA ex rel. STANISLAUS WROTNOWSKI,
v. B. F. BRYAN.

In a proceeding by mandamus, to recover possession of the books, papers and records of an office which he claims, the relator must show that he has an interest in their possession above five hundred dollars, to entitle him to an appeal from the judgment dismissing the rule.

APPEAL from Fifth District Court, Parish of East Baton Rouge, Posey, J. J. H. Stafford, for relator and appellant. A. S. Herron, for defendant and appellee.

WYLY, J. The relator has appealed from a judgment dismissing the mandamus sued out by him, claiming to be clerk of the District Court for the parish of East Baton Rouge, and demanding of the defendant possession of the clerk's office, and all the books, papers and records belonging thereto.

The defendant has moved to dismiss the appeal because the case is not appealable, there being no allegation, and the record not showing that the relator's interest in the matter in dispute exceeds five hundred dollars.

State of Louisiana ex rel Stanislaus Wrotnowski, v. B. F. Bryan.

We find no evidence in the record of the value of the relator's interest in the books, papers and records of the clerk's office; and are of opinion that this court has no jurisdiction in the case.

The motion is well taken. See the case of Sternberg v. Legarde, lately decided, and the authorities there cited.

It is therefore ordered that this appeal be dismissed at the relator's costs.

No. 2058.—In the matter of the Tutorship of the Minor, JOHN G. SCOTT.

A tutor is a competent witness to prove the correctness of his tutorship account. Acts of 1868, page 269.

A tutor, in making up an account of his tutorship, when he has engaged in planting in partnership with another with the property under his control belonging to his ward, the plantation expenses must first be separated from the individual expenses, and after deducting them from the proceeds of the crop, the balance must be proportionately divided, and the individual expenses chargeable to the minor must be deducted from his portion.

A PPEAL from the Parish Court of Tensas, *Steele, J. Farrar & Reeves*, for tutor and appellant. *Julius Aroni*, for opponent.

HOWELL, J. John F. Goodrich, tutor of the minor, John G. Scott, filed an account of his administration, which contains only the proceeds of certain cotton sold in 1861, 1863, 1864 and 1866, from which he deducts certain expenses incurred in saving the said cotton from being burned, hauling, shipping, etc., and of the balance he allows the minor one-third, from which he deducts a bill of the private expenses of the minor and his slaves, leaving a balance in favor of the tutor. The said John G. Scott having just become of age, opposed the homologation of the account, alleging that his tutor had failed to account for certain specifically described movable property belonging to him, and taken charge of by said tutor; and that without authority of law the latter had formed an agricultural partnership between them, and worked the land of both with an equal number of slaves, stock, implements, etc., of each, with which a much larger amount of cotton had been made than set out in the account, all of which makes his said tutor indebted to him in the sum of over \$15,000, for which he asks judgment with interest and mortgage.

On the trial of the opposition, a bill of exception was taken to the competency of the tutor as a witness in his own behalf, on the ground that the law required written evidence to establish the correctness of a tutor's account. The law of 1868, p. 269, does not make such requirement, but permits any one of proper understanding to be a witness of any covenant or fact whatever in civil matters, with the exception that a husband and wife shall not testify for or against each other, and it repeals all laws contrary to its provisions. The tutor was a competent witness; but we think the evidence in the record is so meagre and unsatisfactory, and the accounts filed so confused and imperfectly explained, that justice to both parties requires the cause to be remanded

In the matter of the Tutorship of the Minor, John G. Scott.

to enable them to show how their accounts really stand. We do not think the general statement of the tutor, that "items which are enumerated in said account, which go to make up the aggregate expenses of said \$1942 32, sworn to as correct," makes proof of the various and unusual items of said account of expenses for saving, rebaling, hauling and shipping the cotton. On the theory that the cotton was made by and belonged to a partnership, or the parties jointly, or adopted by both parties, the plantation expenses should be separated from the incidental expenses, and after deducting the former from the proceeds of the crop, the proceeds should be proportionately divided, and the individual or private personal expenses of the minor deducted from his portion. His individual property which passed into the control of the tutor, should be delivered to him or accounted for.

It is therefore ordered that the judgment appealed from be reversed, and the cause remanded for further proceedings according to law. The appellee to pay costs of appeal.

NO. 2114.—STATE OF LOUISIANA v. JAMES REDDING.

In a criminal case, not capital, where a fine above three hundred dollars has not been imposed, the appeal will be dismissed for want of jurisdiction. Constitution, art. 74.

A PPEAL from the Sixth Judicial District Court, Parish of Livingston. *Ellis, J. Bolivar Edwards*, District Attorney, for the State. *C. I. Bradley*, for defendant and appellant.

Howe, J. In this case the defendant was prosecuted for larceny, found guilty by the jury "of trespass," and sentenced "to pay a fine of twenty-five dollars and costs, or twenty-five days in the common jail of the parish," and has appealed. By article 74 of the Constitution, this court has jurisdiction of criminal cases on questions of law only, whenever the punishment of death or imprisonment at hard labor, or a fine exceeding three hundred dollars, is actually imposed.

The court having no jurisdiction, it is ordered and adjudged that the appeal be dismissed with costs.

NO. 2120.—SILVERNAGLE & Co. v. MRS. J. ANN FLUKER.

A general denial and plea to the merits admits the capacity of plaintiff.

Where plaintiff claims in a representative capacity created by law, such as curator or executor, the want of authority must be specially pleaded in *limine litis*, in order to put the party on the proof of his capacity.

A verbal promise to pay a promissory note will interrupt prescription.

A PPEAL from Fifth District Court, Parish of East Feliciana. *Posey, J. Kernan & Lyons*, for plaintiffs and appellees. *Race, Foster & E. T. Merrick and Cross & Hardee*, for defendant and appellant.

Silvernagle & Co. v. Mrs. J. Ann Fluker.

WYLY, J. This suit is based upon the following note, to wit :

"\$1636 50.

" BASTROP, LA., August 9, 1861.

"On the first day of January next, 1862, I promise to pay Silvernagle & Co. or bearer, sixteen hundred and thirty-six and fifty one-hundredths dollars, for value received, with eight per cent. interest from the first day of January last until paid.

(Signed)

" J. ANN FLUKER.

" per B. K. FLUKER."

The petition recites that Benjamin Silvernagle and Edward Starsney, who appear as plaintiffs, are the surviving members of the late commercial firm of Silvernagle & Co., composed of themselves and Wolf Silvernagle, deceased; the widow of Wolf Silvernagle, Mrs. Teresa Silvernagle, also appears as plaintiff in her capacity of tutrix of Albert Silvernagle, minor heir and sole heir of Wolf Silvernagle, deceased. They claim to represent the late firm of Silvernagle & Co., and ask for judgment on the note.

The defendant pleaded the general denial; specially denied "that the plaintiff is administrator, or that the heirship exists, as stated in the petition." She admitted that her son, B. K. Fluker, resided on her plantation, and acted as manager in all matters appertaining to the same; that he was authorized to order supplies for the plantation, to pay taxes, overseer's wages, and other incidental expenses, and to draw orders on her merchant for the same, but that he had no authority beyond this to bind her by making notes in her name. She admitted that since the death of her son, B. K. Fluker, she has paid such orders, drafts, etc., executed by him within the scope of his authority. She specially denied that she was in any manner indebted to plaintiffs at the time the note sued on was executed. She subsequently amended her answer, and pleaded the prescription of five years in bar of plaintiffs' action.

There was judgment in favor of plaintiffs, and the defendant has appealed.

The evidence is sufficient to satisfy us that the note was signed with Mrs. Fluker's authority, or at least she ratified the act of her agent, B. K. Fluker, and promised to pay the note sued on.

The defendant seems to abandon this point, it not being urged in the brief.

The defense, as presented in the brief, is first a denial of plaintiffs' representative capacity; second, the plea of prescription of five years.

First—The defendant contends that the plaintiff cannot recover without proof of the representative capacity asserted in the petition when that fact is specially set at issue. This raises the question, are there proper plaintiffs to this suit? The note is in favor of Silvernagle & Co. Are all the partners of that firm made party plaintiffs herein? We think so. The two surviving partners appear as plaintiffs, and

they join with them the widow of the deceased partner, Wolf Silvernagle, who appears as tutrix and legal representative of his succession. It is true no letters of tutorship or other evidence of her fiduciary capacity was adduced; but the defendant failed to put her capacity at issue by dilatory exception before the joinder of issue. 12 L. 618.

The capacity of Mrs. Silvernagle was virtually admitted by defendant's general denial and pleading to the merits. 19 L. 404. In the case of Parker et al., executors v. Moore et al., 2 A. 1017, this court said "the rule is well settled that when the plaintiff claims in a representative capacity created by law, such as curator or executor, the want of authority to maintain the action must be specially pleaded in *limine litis*, in order to put the party on the proof of his capacity. The answer of the defendants was an admission of the capacity of the plaintiffs which precluded them from contesting it at any subsequent stage of the cause." We have, then, the two surviving partners as plaintiffs, and also the widow representing the succession of the deceased partner in her capacity of tutrix. We think this complies with the law which requires, "when the obligation is in favor of a firm, that all the partners must join in the action to enforce its performance." 4 A. 179; 3 L. 357; 7 L. 196.

The surviving partners had the right to institute this suit by joining with them Mrs. Silvernagle, the tutrix and legal representative of the deceased partner. 9 R. 150.

In the case of Cutler v. Cochran, 13 L. 485, this court said: "On the dissolution of a partnership by the death of a partner, the survivor cannot sue without joining the representatives of the deceased one."

We do not think there is want of proper plaintiffs to this suit, because there is no proof in the record to sustain the averment that Benjamin Silvernagle and Edward Starsney, the two surviving partners, are the duly appointed liquidators of the partnership effects. If they had sued alone without joining the legal representative of the deceased partner, they would have been compelled to establish their authority to sue on the note. Proof of that allegation is quite immaterial where the surviving partners and the representative of the deceased partner have joined in the suit. 9 R. 150.

Second—The plea of prescription is not well taken. There is sufficient evidence in the record to satisfy us that prescription was interrupted before five years had elapsed from the maturity of the note.

The witness Brigham testifies that he called to see the defendant in relation to this claim; "that she recognized the note as just and owing by her, and also recognized the authority of B. K. Fluker to contract the debt." He also states that "she said she could not pay it then, and asked that we would give her all the indulgence in our power, promising to pay the same as soon as as she could. This was some time during the year 1866." * * * * *

Silvernagle & Co. v. Mrs. J. Ann Fluker.

The testimony of this witness is clear and unambiguous. The defendant recognized the note and promised to pay it, before the prescription of five years accrued.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 2098.—Mrs. M. A. RODDY, Administratrix, v. T. C. S. ROBERTSON and H. EDWARDS.

Where the plea of prescription is filed for the first time in the appellate court and the record discloses a state of facts which, if true, would defeat the plea, the case will be remanded for the purpose of admitting proof of the interruption of prescription.

A PPEAL from the Sixth District Court, parish of St. Helena. *Ellis, J. Jas. A. Williams*, for appellant. *Russell & Wright*, for appellees.

WYLY, J. Defendants have appealed from a judgment by default made final against them in this suit, which is based upon their promissory note dated January 3, 1855, and due January 3, 1857. This suit was instituted in September, 1866.

They plead in this court the prescription of five years in lieu of plaintiff's action.

There is no evidence in the record that the defendants ever renounced prescription, nor does it appear that the same was ever interrupted by any act on their part.

It is true there appears an endorsement of a credit on the note signed by W. H. Day, on the fourteenth of January, 1860, and another credit endorsed thereon October 2, 1865, which is not signed by any one. We do not think that these endorsements of credits which are not signed by the defendants establish an interruption of prescription.

As the judgment allows these credits, which if fully established, would interrupt prescription, and as the plea of prescription is set up for the first time in this court, we think that justice requires that this case should be remanded.

It is therefore ordered that the judgment appealed from be avoided and annulled, and it is now ordered that this case be remanded for new trial, and that appellee pay costs of this appeal.

Frederick Funke, Administrator, v. James McVay, Tutor.

No. 2084.—FREDERICK FUNKE, Administrator, v. JAMES McVAY, Tutor.

An order for a suspensive and devolutive appeal may be granted by the judge *a quo*, separately, or both, in one order, and the appellant may in his discretion avail himself of the benefit of either order by giving the required bond within the time prescribed by law.

Where a promissory note is prescribed on its face and no interruption is shown, the plea will be maintained.

APPEAL from Fifth District Court, parish of East Baton Rouge, Posey, J. Favrot & Lamon, for appellee. R. W. Knickerbocker and A. S. Herron, for appellant.

WYLY, J. Plaintiff has moved to dismiss this appeal :

1. Because the district judge having granted a suspensive appeal on the sixteenth of November, 1868, was without authority to grant this devolutive appeal on the ninth day of December, thereafter.

2. Because the order for devolutive appeal does not state when and where the appeal is returnable.

Both orders for appeal were granted in open court within a few days after the judgment was rendered. The order for suspensive appeal was not acted upon by the defendant, no bond having been given in conformity therewith.

The mere existence of this order did not, in our opinion, deprive the judge, *a quo*, of authority to grant an order for a devolutive appeal. A suspensive and devolutive appeal may be granted in separate orders as well as in the same order; and the party obtaining the orders may perfect the appeal by giving the bond required for a suspensive or a devolutive appeal, just as he pleases.

It was the duty of the District Judge to fix the return day, C. P. 574; but it does not appear that this defect in the order is imputable to appellant. He has brought up the transcript and filed it at the first term fixed for trial of cases from that district, after the rendition of the judgment.

The sixteenth section of the act approved March 13, 1866, provides, "that no appeal to the Supreme Court shall be dismissed on account of any defect, error or irregularity of the petition, order of appeal, or in the certificate of the clerk or judge, or in the citation of appeal or service thereof, or because the appeal was not made returnable at the next term of the Supreme Court, whenever it shall not appear that such defect, error, or irregularity is imputed to appellant." * * * Acts of 1866, p. 154.

The motion to dismiss this appeal is therefore overruled.

The defendant has appealed from a judgment rendered against him, which is based upon a promissory note due January 1, 1862. The defense is the plea of prescription of five years. Citation was served on the fifth of January, 1867, more than five years after the maturity of the note. There is no evidence of interruption or renunciation of prescription. The plea was well taken. C. C. 3505.

It is therefore ordered that the judgment appealed from be avoided and reversed, and it is now ordered that there be judgment in favor of defendant, dismissing this suit at plaintiff's costs.

S. Gosselin v. A. B. Womack and D. W. Thompson.

No. 2129.—S. GOSSELIN v. A. B. WOMACK and D. W. THOMPSON.

An action will not lie to enforce a contract, the consideration of which is shown to be the price of the sale of slaves, nor will an action lie to compel the vendor to return the portion of the price paid before emancipation. *Wainwright v. Bridges*, 19 An. 234.

APPEAL from the Sixth Judicial District Court, parish of St. Helena, *Ellis, J. Wilson*, for plaintiff and appellee. *Pipkin & Hunter*, for defendants and appellants.

HOWELL, J. This suit is brought on a written obligation, dated December 2, 1865, to pay two thousand four hundred pounds of ginned cotton or \$960, with eight per cent. interest. The defense is, that said instrument was given in part payment of certain slaves sold on third of March, 1865, by plaintiff to the defendant, A. B. Womack, who claims in reconvention the return of two thousand five hundred and forty-seven pounds of cotton given by him in part execution of said contract of sale, or its market value.

The cause was twice tried before a jury, who found a verdict each time against both parties, and the defendant Womack has appealed from a judgment on the second verdict. He contends that under the authority of the case of *Finn v. Carr*, 19 A. 106, he is entitled to recover back the portion of the price paid on a void contract.

We consider that case overruled by the subsequent case of *Wainwright v. Bridges*, 19 A. 234, and the now well established jurisprudence of this State, under which neither party to such contracts can successfully invoke the aid of the courts. The fact that the transaction occurred after emancipation can avail the vendee no more than the vendor. Both are equally implicated in the wrong.

Judgment affirmed with costs.

No. 2090.—In the matter of CHRISTOPHE DOCTEUR—MATHIAS SCHUMERT, Assignee v. MRS. M. A. TAMBOURY and her Husband.

An appeal from a judgment annulling a seizure made under a writ of *fi. fa.* will be dismissed where the record does not show that the value of the rights seized is above five hundred dollars.

APPEAL from the Second District Court of New Orleans, *Durigneaud*, *J. John S. Tully*, for assignee and appellant. *Cyprien Dufour*, for appellees.

TALIAFERRO, J. This case is before us upon an appeal from a judgment annulling a seizure under a writ of *fi. fa.* We find nothing in the record showing the value of the rights seized, nor anything authorizing this court to take jurisdiction of the matter.

It is therefore ordered, adjudged and decreed that this appeal be dismissed at appellant's costs.

William Pratt v. L. R. Draughon.

No. 1659.—WILLIAM PRATT v. L. R. DRAUGHON.

Where the evidence leaves it in doubt whether the parties engaged in cotton transactions during the late war did not fall within the prohibitions of trade and intercourse placed on citizens by the United States, the case will be remanded to give both parties an opportunity of offering evidence on the point.

APPEAL from the Sixth District Court, parish of St. Helena. *Ellis, J. J. E. Wilson*, for plaintiff and appellee. *T. C. W. Ellis*, for defendant and appellant.

HOWELL, J. This is an action for the delivery or the value of seven bales of cotton of the weight of three thousand three hundred and twenty-five pounds, balance of fifteen bales alleged to have been deposited on twenty-ninth December, 1863, by plaintiff, a resident of the parish of East Baton Rouge, with defendant, a resident of the parish of St. Helena, and also for a balance of an account for goods and merchandise sold by plaintiff to defendant from November 19, 1863 to January 28, 1865. The defense is a general and special denial, and the allegation that as agent of plaintiff, the defendant was engaged to purchase for and deliver cotton to the former at his residence, who furnished the funds and was to allow defendant one-half the net profits as well as pay him for his services, which were worth \$600, and the half profits of the cotton already sold amount to \$551 95, which, with other items for services, he claims in reconvention.

Judgment was rendered in favor of plaintiff for seven bales weighing two thousand eight hundred and fifty pounds, or their value, fixed at \$855, and for \$112 75, with interest from twenty-eighth January, 1865, recognizing and allowing defendant's right to one-half of the profits, if any, on the eight bales delivered and rejecting the reconventional demand, from which defendant appealed.

Our attention is called to the bill of exception taken to the refusal of the District Judge to order the plaintiff to answer an interrogatory, as to whether he had during the war taken an oath of allegiance to the United States, the object being to prove that he was a citizen of the United States, then at war with the Confederate States, of which defendant was at the time a citizen and had been a soldier. The court did not err. The fact was totally irrelevant to the issue, and the object one which a court could not entertain as between citizens.

But the evidence in the record has raised a very strong presumption that the intercourse and dealings between the parties were prohibited by acts of Congress and proclamations of the President of the United States, and we feel it our duty to reverse the judgment and remand the cause, to enable the parties to remove any doubt on this point, and to establish the weight and value of the cotton, if plaintiff is entitled to it, and to settle the compensation of defendant, if any, under the pleadings.

It is therefore ordered that the judgment appealed from be reversed and the cause remanded to be proceeded in according to law. Plaintiff to pay costs of appeal.

Susan V. Harrell, Tutrix, v. Gideon White.

No. 2097.—SUSAN V. HARRELL, Tutrix, v. GIDEON WHITE.

A verbal promise to pay a promissory note before prescription has accrued, not denied when interrogated on facts and articles, will defeat the plea of prescription.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. Posey, J. Kernan & Lyons, for plaintiff and appellee. F. Hardesty, for defendant and appellant.

HOWE, J. The defendant has appealed from a judgment upon a promissory note due January 5, 1861, founded on citation served September 16, 1867. The prescription of five years was pleaded.

It was proved on behalf of plaintiff that in October or November, 1865, the defendant verbally acknowledged the validity of the note and promised to pay it. Prescription, not having then accrued, could be and was thus interrupted. There is no question of *renunciation* in the case.

The defendant being interrogated on facts and articles as to his acknowledgment of the debt, replied that he had "no recollection of ever having promised to pay the same," but he did not deny the acknowledgment.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 2146.—H. B. CHASE v. ELIZA MCCAY, et al.

A donation which acknowledges an indebtedness to the heir, but declares that it is given as an extra portion and not to be accounted for at the partition of the donor's estate, is presumed to be fraudulent. C. C. 1975.

A judgment creditor can have a donation *intervivos* made by his debtor in fraud of his rights annulled, and have the property donated made liable for his debt, provided the donor fail to show other immovable property, unincumbered, to an amount sufficient to pay the debt.

APPEAL from the Fifth District Court, parish of East Feliciana, Posey, J. Kernan & Lyons, for plaintiff and appellee. McVea & Hunter, for defendants and appellants.

HOWELL, J. This is an action to annul a donation of certain immovable property in the town of Clinton, Louisiana, made by a mother to her daughter in consideration of her affection for and indebtedness to the donee, and to subject said property to the judicial mortgage of plaintiff.

The evidence shows that plaintiff's claim existed prior to the date of the act of donation, and that upon issuing an execution on his judgment, obtained shortly after said date, no property, in the name of the judgment debtor, could be found and the execution was returned unsatisfied. We consider the act in question to be a gratuitous donation, notwithstanding the recital of indebtedness therein, as it does not

profess to extinguish any part thereof but declares the donation to be an extra portion and not to be accounted for at the partition of the donor's estate.

As such it is presumed to be fraudulent, C. C. 1975, and it was incumbent on the defendants and appellants to show that the donor had sufficient property, at least, to satisfy plaintiff's demand.

Judgment affirmed.

No. 2088.—G. KLEINPETER, Administrator, v. A. HARRIGAN, et al.

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A transfer, in writing, of real estate is null as a sale if the act does not show that a price has been fixed and agreed upon. The price is essential to the contract of sale. C. C. 1757.

A fixed price is of the essence of the contract of *dation en payment*. 10 L. 151.

A PPEAL from the Fifth District Court parish of East Baton Rouge, Posey, J. *Fuqua & Calliham*, for appellant. *R. W. Knickerbocker*, for appellee.

HOWELL, J. Plaintiff, as Administrator of the succession of John Kleinpeter, deceased, instituted a possessory action on the fifteenth of January, 1868, against the defendants to be quieted in the possession of a certain tract of land in East Baton Rouge, containing about two hundred and fifty acres upon which he alleges they had entered about the first January inst., 1868, and commenced cutting timber and erecting buildings, and he prayed for an injunction and damages. The defense set up title in Nancy Trim, one of the defendants, to fifty acres of land on the rear of said tract, by purchase under private signature on the thirty-first of December, 1866, from said John Kleinpeter, father of plaintiff, for the price of five hundred dollars, agreed on between the parties and due her for services, but which was omitted through error from said act of sale, and she prayed that the injunction be dissolved, and she be deemed the owner of said land.

By consent, the suit was tried as a petitory action, and judgment having been rendered in favor of defendant, Nancy Trim, the plaintiff appealed.

The instrument in question is in the following words:

“Know all men, that I have this day sold to Nancy Trim, my colored servant, and a good and faithful one she has proved to me. I gave her her freedom about ten years ago, yet she holds fast, and watches and cares for me in the most tender manner, and for her good conduct, I have this day sold her fifty acres of land in the rear of my plantation. Said land is bounded on the northeast by Mr. McIntosh's land, on the east by Mrs. Smith's farm, and on the northwest by Mr. Edmonston's farm. Said land is sold to her as a recompense, as a payment for her services to me, as I have paid her nothing for a number of years past. In witness whereof, I have set my hand and seal this thirty-first day of

George Kleinpeter, Administrator, v. A. Harrison, et al.

December, in the year of our Lord one thousand eight hundred and sixty-six.

(Signed)

his
"JOHN ✕ KLEINPETER.
mark.

"Witnesses: A. S. ANCOIN, A. W. FORTUNE."

On the sixth of January, 1867, it was proven by said witnesses before and recorded by the parish Recorder. It is contended that this is not a sale, for want of a price.

"Three circumstances concur to the perfection of the contract, to wit: the thing sold, the price and the consent. The price of the sale must be certain; that is to say, fixed and determined by the parties.

"It ought to consist of a sum of money, otherwise it would be considered as an exchange.

"The price, however, may be left to the arbitration of a third person; but if such person cannot, or be unwilling to make the estimation, there exists no sale." C. C. arts. 2414, 2439.

"A price is essential to a contract of sale; if there be none, it is either no contract, or if the consideration be other property, it is an exchange." C. C. 1757.

The only reference in the act to a consideration is "for her good conduct I have this day sold," and "said land is sold to her as a recompense, as a payment for her services to me, as I have paid her nothing for a number of years past." Harrigan, the only witness who testifies to the value of the services, says he thinks from what he saw they were worth from one hundred and fifty to two hundred dollars a year. He was on the place something over a year before the death of John Kleinpeter, and was frequently there from the fall of 1864, to May, 1865, previous. His testimony does not fix a price as agreed upon, or determined by the parties. The court would have to fix the price by assuming the time for which the services were unpaid, and adopting an alternative or undeterminate sum for their value. There is nothing from which we may safely infer that a price was agreed upon. The case of *Hellnin v. Minor*, 12 An. 124, is not a parallel one. There the act was made to conform to the instructions of the Department at Washington, where it was to produce its principal effect, and the court inferred from the language used "for value received," that the price was agreed upon and paid, or its equivalent given in exchange. Here the language used does not warrant such inference. No price nor value is given to the land or services.

The act, therefore, is not one of sale. Nor is it a *dation en payment*, in which a fixed price is also of the essence of the contract. C. C. 2625, 2629; 10 L. 151. And, besides, no attempt at obtaining possession seems to have been made by the defendant for twelve months or more after the date of the act, and it appears that during that time the whole

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plantation was in the possession of administrator. The registry of the act seems to have been made after the death of John Kleinpeter, the alleged vendor, and cannot have the effect against his succession as a public act executed by him, as to delivery, another essential in a contract of *dation en payment*. It is not pretended that it is an exchange or donation *intervivos*.

We must conclude that the act before us is evidence of no contract known to our law.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff, as administrator of the succession of John Kleinpeter, deceased, be decreed to be the owner of the tract of fifty acres of land described in the answer of and claimed by defendant, Nancy Trim, with costs in both courts.

No. 2126.—J. G. D'ARMAND v. THE SHERIFF, *et als*.

A third party cannot hold personal property against a seizing creditor if he has permitted the property purchased to remain in the possession of the seized debtor.

Where personal property has been sold as described in a written notarial act, and the purchaser has a written order from the vendor to take possession, such order must identify the property conveyed in order to constitute a delivery.

APPEAL from the Fifth District Court, parish of East Feliciana. Posey, J. Kernan & Lyons, for plaintiff and appellee. L. M. Pipkin and S. E. Hunter, for defendants and appellants.

HOWELL, J. By virtue of several writs of *fi. fa.* against O. W. Fluker, the Sheriff of the parish of East Feliciana, seized on the first of February, 1867, six mules, two horses, one four mule wagon and harness, and one family carriage and harness, as the property and in the possession of said Fluker, and appointed him custodian thereof. On the twenty-seventh of the same month, J. G. D'Armand, the brother-in-law of Fluker, enjoined the sale of said property, claiming to be owner thereof by an authentic act of sale on the fourth of January, proceeding from Fluker to himself.

The defense is that said sale is simulated and made by said Fluker to defraud the creditors of said Fluker, who is insolvent.

The case was tried before a jury, who found a verdict in favor of the plaintiff, and from a judgment thereon, after a fruitless attempt to obtain a new trial, the defendants have appealed.

Admitting that the contract of sale was real and the price actually paid, there was no delivery before the seizure. The sale was made in the town of Clinton, of all the judgment debtor's property, and which was then on the "Pond place," occupied by him and his family. The delivery is claimed to have been effected by the vendor handing to his wife, on his return home that day, the following instrument:

"CLINTON, La., January 4, 1867.

"Mrs. E. J. Fluker is hereby authorized to take in charge the mules, forage, and plantation implements, and use for the purpose of making a crop.

"J. G. D'ARMAND."

J. G. D'Armand v. The Sheriff, et al.

This does not identify the property as described in the notarial act of sale, which consisted of a carriage and harness, 400 bushels of corn, 6000 pounds of fodder, 3000 pounds of hay, ten cows and calves, three head dry cattle, ten head of hogs, six mules, two horses, one wagon, one lot of gear, one lot of plows, one lot of harness and five head of sheep, at specific prices, amounting in the aggregate to \$2120. Nor does it show that the property seized was the property which the wife was authorized to take in charge, even conceding, which we do not propose to do, that the wife, not separate in property, could thus receive the delivery for a third person of the property sold by her husband.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of the defendants, dissolving the injunction herein, and condemning plaintiff and his surety to pay defendants one hundred and fifty dollars damages and costs in both courts.

Rehearing refused.

No. 2101.—JULIUS ARENSTEIN v. E. J. WEBER, Sheriff, and THEODORE BRIERE.

A District Court is competent to issue an injunction against a seizure made by the Sheriff under a *fieri facias* or order of sale issued from another parish of the State, and to try the issues raised by the injunction. 5 An. 644; 16 An. 110.

The question of simulation does not arise in a suit by injunction between the seizing creditor and a third opponent who claims the property, unless the seizing creditor shows that he owns or has sold it.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Miller, J. Wickliffe & Fisher*, for appellee, *Collins & Leake*, for appellants.

HOWE, J. The plaintiff enjoined the sale of certain merchandise, of which he claimed to be owner, and which had been seized by the defendant, Weber, Sheriff of West Feliciana, under a writ of *fieri facias*, issued out of the Sixth District Court of New Orleans in the case of *Theodore Briere v. Joseph Arenstein*.

The defendants appeared and moved to dissolve the injunction on the grounds, that the court had no jurisdiction over the writ enjoined, the judgment having been rendered in the Sixth District Court of New Orleans; that no manifest injury would or could arise by the court refusing to entertain jurisdiction, that the affidavit was insufficient, and that the bond was a nullity for want of United States internal revenue stamps. The court refused to dissolve the injunction, and, as we think, correctly.

The affidavit appears to be in form, and no stamps are by law required on injunction bonds. As to the power of the court to enjoin a writ

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issuing from the parish of Orleans, the question seems to have been settled in the affirmative by a series of decisions extending over a period of about forty years. 8 M. 61; 4 U. S. 388; 2 A. 323; Id. 492; 4 A. 84; 5 A. 644; 16 A. 110.

The defendants answered by a general denial, a special denial that the goods seized were the property of plaintiff, and an averment that if any sale of the goods was ever made by Joseph to Julius Arenstein it was simulated and fraudulent, and unaccompanied by delivery. The case having been tried upon its merits, judgment was rendered in favor of plaintiff, perpetuating the injunction with fifty dollars damages.

The plaintiff established his property in the goods, and as it does not appear that Joseph Arenstein ever owned or sold them the question of simulation is not in the case. We see no reason to disturb the judgment.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 1138.—M. FRIEDMANN & Co. v. E. M. HOUGHTON and G. INGRAM.

In a suit on a promissory note which expresses on its face "for value received" the burden of showing want or failure of consideration falls on the defendant.

Damages will be adjudged against the appellant for frivolous appeal when the record shows no grounds for a reversal of the judgment and it is manifest the appeal was taken for delay.

APPEAL from the Fifth District Court of New Orleans. *Leaumont, J. T. A. Bartlette*, for appellants, *J. M. Dirrhammer*, for appellees.

TALIAFERRO, J. The plaintiffs sue on a promissory note for the sum of \$1635, with legal interest from the fourteenth June, 1866. The note was drawn by Houghton to the order of Ingraham and by him indorsed, and expresses on its face that it was for value received. The defense is want of consideration. Judgment was rendered *in solido* against the defendants as prayed for, and they have appealed.

There is no error in the judgment. It was for defendants to show want of consideration. This they have not offered to do, no evidence whatever having been introduced by them. 1 An. 325.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs. It is further ordered that the plaintiff recover from the defendants ten per cent. on the amount of the judgment as damages for a frivolous appeal.

Rehearing refused.

No. 1983.—STATE OF LOUISIANA v. FRANK KING.

A State tax collector is competent to sue for and recover in the name of the State any tax or license due by a tax payer.

The act of the Legislature of 1865 imposing a license tax on attorneys at law is equal and uniform on all persons engaged in the practice of the profession, and is therefore not in conflict with article 124 of the Constitution of 1864, nor with article 118 of the Constitution of 1868. The State, having authorized the issuing of a license to a party to practice law, is not thereby precluded from taxing such party annually for pursuing the profession within the State.

A PPEAL from First Justice's Court, parish of Orleans. *Sadler, J. H. C. Dibble*, for plaintiff, *King & Labatt*, for defendant.

WILY, J. The State Tax Collector has instituted this suit to recover of the defendant the sum of fifty dollars claimed as his license for practicing law for the year 1863.

There was judgment in favor of the plaintiff, and the defendant has appealed. The defendant basis his defense upon the following grounds in his peremptory exception :

First—Because this action has been instituted by the State Tax Collector who is without authority in law to do so, the Attorney General and the District Attorney being the only persons authorized to institute suits in the name of the State.

Second—Because there is no law of the State of Louisiana imposing a tax or license on defendant's occupation, the act approved fourth of April, 1865, being contrary to article 124 of the Constitution of 1864, and article 118 of the Constitution of 1868, and therefore null and void.

Third—Because attorneys at law are licensed by the courts under a general law of the State and can have no restrictions imposed upon the exercise of their profession except as provided by law for some violation of professional duty. That as attorney at law he has a vested right in his profession, and the license originally granted to him is evidence of it; that this right cannot be divested except by due process of law, and any attempt by the State to impose a license or onerous condition upon him for pursuing his profession is contrary to the constitution of the United States and of this State.

Defendant further pleads in reconvention the sum of fifty dollars, which he alleges the State illegally and unconstitutionally collected from him for the year 1867, for an alleged license for practicing his profession that year.

There is no contest as to facts, the defendant being admitted to be a practicing attorney of this State who has refused to pay his license for 1868.

The constitutional and legal questions presented by the defendant are neither new nor difficult of solution. They have all been investigated heretofore by this court, and we regard the jurisprudence of the State well settled on the points presented in this case.

First—The first ground of exception, that the tax collector cannot sue in the name of the State is not tenable. In the case of the State through Thomas Askew, State Tax Collector, v. the Southern Steamship Company, 13 A. 497, this court said: "It appears to us that the right to collect the taxes presupposes a right to stand in judgment in suits of injunction, and even to institute an action in the name of the State wherever the taxes cannot be otherwise collected. It is true that the law has indicated a more summary proceeding than suit for the collection of the taxes; still as the sheriff is charged with their collection, for which he is compelled to give bond, we can see no sufficient reason why he should not be permitted to use the name of his principal in a direct action, instead of seizing property, if it is evident that the seizure will occasion an injunction or necessary delay. It does not lie in the mouth of a defendant to question the right to sue, when he admits the propriety of the same by the issue he tenders, and a denial of the State to recover."

Second—The second ground of exception, that there is no law authorizing the collection of the license claimed of defendant, the act approved fourth April, 1865, being contrary to act 124 of the Constitution of 1864 and article 118 of the Constitution of 1863, is also untenable. We think the sixth section of the act approved fourth April, 1865, does impose a license upon defendant's occupation, and that in doing so it does not violate article 124 of the Constitution of 1864, and article 118 of the Constitution of 1868. We had occasion to review this point fully in the case of the State of Louisiana v. J. Volkman, lately decided, and for the reasons therein assigned we are of opinion that the act imposing the license upon defendant's profession or pursuit is not unconstitutional. The license is equal and uniform upon all persons pursuing the occupation of attorney at law.

Third—The third ground of exception, that the defendant should not pay a tax or license for pursuing the occupation of attorney at law because he is licensed by the courts of the State to practice, and because it divests his vested rights, etc., is also invalid.

This point has been frequently determined by this court adversely to the defendant, and is no longer an open question. In the case of the State v. Rufus Waples, 12 A. 243 this court said: "The argument that the permission or license to practice law is a contract between the State and the attorney at law which shields him from taxation, and which cannot be regulated in any manner during his lifetime by the Legislature, merits no serious reply."

The reconventional demand set up by the defendant for the amount of his license paid in 1867 does not merit a discussion.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 2044.—S. O. NELSON & CO. v. THE HEIRS OF JOHN J. SCOTT.

Where the certificate of the Clerk to the record of appeal is in due form and the amount of the appeal bond is sufficient to cover costs, the appeal will not be dismissed on motion of the appellee.

The plea of prescription may be made in the Supreme Court, and when the record shows that the obligation sued upon is prescribed the plea will be maintained.

APPEAL from the Thirteenth District Court, parish of Tensas. *Hough, J. Mayo & Spencer*, for plaintiffs and appellees, *Leach & Lewis*, for defendants and appellants.

LEDELING, C. J. The appellees have moved to dismiss the appeal on the grounds that the record does not contain any note of evidence, statement of facts, bill of exceptions, nor assignment of errors of law on the face of the papers. That the record does not contain all the evidence adduced on the trial, and that the appeal bond is not such as the law requires, being in favor of the clerk of the court and the appellees.

The bond is for a devolutive appeal to secure the payment of costs. Having been made in favor of the clerk and appellees, we cannot conceive why the appellees should complain. The costs are fully secured. The addition of the names of the appellees was surplusage.

The certificate of the clerk is in due form, and although our mandate was issued to that officer at the instance of the appellees to cause him to amend his certificate so as to make it conform to the facts, he reiterated in his answer that his certificate was true and correct, and that he could not truthfully amend it. Besides, the plea of prescription has been filed in this court. The motion to dismiss is overruled. See *Louisiana State Bank v. Cammack*.

The appellants applied for an appeal by petition, in which they allege that they desired to appeal from the judgment against them in order to plead the prescription of five years in this court.

The plea was filed in this court and application has been made to have the case remanded to be tried on that issue.

The note sued on was due and exigible on the fifteenth February, 1861; the citations were all served on the defendants more than five years thereafter. The plea of prescription must be sustained. *Smith v. Stewart et al.*, 21 An. p. 67.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed. It is further ordered that there be judgment in favor of the defendants, and that the plaintiffs pay the costs in both courts.

No. 2050.—BRITTON & KOONTZ v. JOHN JANNEY, Sheriff, et al.

A recital in an act of mortgage that a previous mortgage had been inscribed against the same property will not operate a legal reinscription of the former mortgage; nor will the recital of the former mortgage in the certificate make the latter a party to the former act, or operate as a further notice than that already given by the first inscription.

The fact *de non alienando* contained in an act of mortgage does not dispense the mortgage from the necessity of inscription in the mortgage office, and reinscription within ten years in order to preserve and give validity to the mortgage rights.

APPEAL from the Thirteenth District Court, parish of Concordia. *Hough, J. Mayo & Spencer*, for plaintiffs and appellants, *H. B. Shaw*, for defendants and appellees.

WYLY, J. This is a contest between mortgage creditors for the proceeds of the sale of a plantation in the parish of Concordia.

On tenth May, 1856, A. T. Welch executed the mortgage upon which plaintiffs base their claim. On the ninth February, 1859, he made another mortgage bearing on the same property in favor of the defendant, Mrs. Mary E. Shaw. On the seventeenth September, 1867, Mrs. Shaw applied to the recorder to erase the mortgage of plaintiffs because the same had not been reinscribed within ten years. Plaintiffs enjoined the recorder from making the erasure. This injunction was dissolved by the District Court, and, on appeal, by this court, and the recorder was required to erase plaintiffs' mortgage, which he did.

Mrs. Shaw then proceeded to foreclose her mortgage, when plaintiffs made a third opposition and enjoined the sheriff from applying the proceeds of the sale to the judgment of Mrs. Shaw under which he was selling the property. This injunction was dissolved, and plaintiffs have appealed.

Plaintiffs contend that their mortgage has not lost its priority in rank over the defendants.

First—Because the reinscription of their mortgage was rendered unnecessary by the inscription of the Shaw mortgage wherein their note and mortgage are clearly set forth.

Second—Because Mrs. Shaw had full notice of their mortgage, the same being mentioned in the certificate of mortgages embraced in her own mortgage, and she cannot be considered a third party.

Third—Because their mortgage contains the fact *de non alienando*, and the subsequent mortgage to Mrs. Shaw was made in violation of that fact, and as to them is null and void.

It will not require serious argument to refute the first position of plaintiffs. The inscription of Mrs. Shaw's mortgage, embracing the mortgage certificate, wherein the previous mortgage of plaintiffs is mentioned, is not a legal reinscription of plaintiffs' mortgage. The mere recital in her mortgage that plaintiffs had inscribed their mortgage against the same property is not a legal reinscription. Article 3333 of the Civil Code informs us in what manner mortgages must be reinscribed. It declares that the effect of the inscriptions ceases if they have not been renewed within ten years "in the manner in which they were first made."

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Plaintiffs' second position is also untenable. The recital of their mortgage in the certificate embraced in Mrs. Shaw's mortgage did not make her a party to their mortgage, nor did it give her any further notice than she already had from the registry of their mortgage.

The previous inscription of plaintiffs' mortgage gave them a superior rank over the defendant and all junior mortgage creditors during the lawful period of its inscription. Having failed to reinscribe their mortgage within ten years, plaintiffs lost the right of priority, the effect of the inscription. C. C. 3333. This right did not result from any notice, judicial or extra judicial, which Mrs. Shaw might have of the existence of their mortgage, but it resulted alone from the inscription from complying with the registry laws.

Plaintiffs cannot invoke the registry laws to establish their priority on the proceeds in the hands of the sheriff, resulting from the sale of the property under Mrs. Shaw's mortgage, because they have lost the right of priority which those laws gave them by failing to renew their inscription within ten years as required by said laws. 6 Rob. 166, 419; 2 A. 100; 13 A. 569. The third position of plaintiffs is also invalid. The fact *de non alienando* contained in plaintiffs' mortgage did not render inscription unnecessary and the subsequent mortgage to Mrs. Shaw null and void. The non-alienation clause dispensed with necessity of notice to any third possessor of the mortgaged property, so that plaintiffs could proceed to foreclose their mortgage contradictorily with the mortgagor just the same as if the property remained in the hands of the mortgagor. The object of that clause was to prevent the delays of a hypothecary action in case the property might be sold. It did not dispense with the necessity of inscription and reinscription.

Inscription was necessary to give plaintiffs' mortgage effect against third persons and reinscription within ten years was absolutely essential to preserve that effect for a longer period. C. C. 3314, 3333.

It is therefore ordered that the judgment appealed from be affirmed with costs.

**NO. 1145.—EUGENE LASERE *v.* EUGENE ROCHEREAU & Co. *et al.*, and
EUGENE LASERE *v.* ANTOINE DELPHINE, *et al.***

A resident of New Orleans who, shortly after the Federal forces took possession of the city, in 1862, registered himself as an enemy of the United States, and left the Federal lines of military occupation for the insurrectionary districts, cannot be viewed in the light of a person banished or forced away from his domicile against his will and without his consent. Where a party, whilst residing in New Orleans, executed a mortgage on his property here, and afterwards, by his own voluntary act, leaves the State and remains away for nearly two years, having left no agent in charge of his property, or authorized to represent him, nor housekeeper in possession of his former residence, with no known intention of returning to the State at any future time, he must be regarded and treated by the mortgage creditor as an absentee, who, in a suit against the property mortgaged may cause a curator *ad hoc* to be appointed to represent the absentee, with whom proceedings may be conducted contradictorily, and the property seized and sold to satisfy the mortgage rights.

The doctrine in the case of *Samory v. Montgomery*, 19 An. p. 333, reaffirmed.

A PPEAL from the Sixth District Court of New Orleans, *Duplantier, J. A. & M. Voorhies*, for plaintiff and appellant. *J. Magne* and *C. E. Schmidt*, for *E. Rochereau & Co.*, and *A. Dolphini*; *Miles Tay-*

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lor, for Samuel Moore and Mrs. C. Bullitt and husband, defendants and appellees.

TALIAFERRO, J. The plaintiff sues to annul a sale made *via executiva* under the following circumstances: After the taking of New Orleans by the national forces in the spring of 1862, the plaintiff, being what was termed "a registered enemy of the United States," and a resident of the city, received a military order dated May 7, 1863, to leave the parish for the so-called Confederacy before the fifteenth of the month. In conformity with this order, it seems from the evidence, that he went to Mobile about the end of the month of May, 1863, where he continued to reside until that city was captured in April, 1865, at which time he returned to New Orleans. About six months after his departure from New Orleans, in 1863, the defendants being mortgage creditors of the plaintiff, by acts importing confession of judgment, obtained orders of seizure and sale against the mortgaged property, consisting of a house and lot situated in a central part of the city, and after the usual process the property was sold. A curator *ad hoc* was appointed to represent Lasere, as an absentee; the same person, an attorney at law, acting as curator *ad hoc* in both cases. In November, 1865, the plaintiff, Lasere, instituted this suit against the defendants to annul the sale of his property in his absence on the ground that he was not an absentee by legal intendment; that his status was that of a resident of New Orleans; that he had no other domicile, and that he constantly had the purpose of returning during his temporary absence. The purchaser of the property was made a party to the suit, and he in turn called the seizing creditors in warranty. Judgment was rendered in favor of the defendants and the plaintiff has appealed.

The prominent question in the case is, did the facts and circumstances existing at the time the proceedings *via executiva* were taken, legally warrant the appointment of a curator *ad hoc*?

The argument in behalf of the plaintiff is two-fold: First. That his temporary absence by military compulsion did not affect his residence; and having a residence, and his absence being temporary, a curator *ad hoc* could not be legally appointed to represent him. Again, that if Lasere, exiled as a registered enemy, became a resident of the insurgent State of Alabama, then the jurisdiction of the Sixth District Court was suspended as to him; he could neither sue nor be sued in that court if there be any efficacy in the Congressional prohibition.

Conceding that at the time in contemplation a person not having a domicile in New Orleans, but resident in one of the insurgent States, and owning property and having creditors in New Orleans, could not be proceeded against by them under the ruling in the Alexander case, and according to the other authorities cited by plaintiff's counsel, because such person would have had no status in the courts of New Orleans and could not have been either plaintiff or defendant, does it follow that another person having a domicile in New Orleans, but who

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left that domicile and took up his residence in one of the insurgent States, acquires the same immunity from legal proceedings? His situation would seem to be different from that of the person first supposed. In the one case the immunity arises solely from the operation of rules regulating the condition of war. In the other it proceeds from the act of the individual himself. But it is said that in the case of the plaintiff the absence was compulsory. And yet it appears that his expulsion from the place of his domicile was superinduced by his own voluntary assumption of the status of a registered enemy of the United States, so that primarily, his removal was the result of the free exercise of his own will. There existed no necessity for his absence antecedent to this exercise of his own volition. During his residence in New Orleans, and before this voluntary change of his condition, the plaintiff was under the protection of the laws then in force in the city. The courts were open and legal proceedings going on. He might have occupied the position of plaintiff or defendant in these courts. He was present, and the right of his creditors to enforce the performance of his obligations to them might have been exercised at any time. Can we say that it was in his power to deprive his creditors of that right altogether or to suspend indefinitely its exercise by voluntarily assuming the character of a public enemy and taking up his residence in an insurrectionary State? We cannot so conclude.

But the other branch of the argument seems more confidently relied upon, namely, that he had a domicile in New Orleans, which was never changed, and therefore that he was not an absentee, and Article 3522 paragraph 3, is referred to. We think a fair interpretation of this article does not sustain the broad ground assumed in argument, which in substance is, that so long as domicile continues, representation by a curator *ad hoc* is excluded. This doctrine would lead to consequences plainly unreasonable and repugnant to the fitness and propriety of things. By the statute of 1855, it is provided that a voluntary absence from the State for two years, or the acquisition of residence in any other State of this Union, or elsewhere, shall forfeit a residence within this State. A debtor then leaving property in the State could defy the pursuit of his creditors for that length of time by absenting himself, taking care to leave behind him no agent to represent him, and no person upon whom a citation could be served. The settled jurisprudence of the State ignores the toleration of such an anomaly in the process of the enforcement of the rights of creditors. In the early case, reported in 6 N. S. p. 15, this court commented in decided terms against the admission of such a doctrine and sustained the appointment of a curator *ad hoc* to represent Mr. Livingston, then at the seat of Government of the United States, in attending to his duties as a member of Congress, on the ground that he had left no one to represent him in his absence. Our immediate predecessors had occasion in the case of *Samory v. Montgomery*, 19 An. p. 333, to review at some length this much vexed question of the appointment of a curator *ad hoc* to represent persons absent from the State, and that after an elaborate and exhaustive argument by eminent counsel on each side. The views expressed

Eugene Lasere v. Eugene Rochereau & Co. et al., and Eugene Lasere v. Antoine Delphine, et al.

by the court in that case are entirely in unison with that referred to in 6 N. S., and the general current of decisions since that time. In the case of *Samory v. Montgomery*, the court remarked: "If the term absentee can only be applied to a person who never had a domicile in the State, or who having had a domicile in the State has left it permanently, and lives permanently beyond its limits, it is plain that such a construction of the term would operate injurious and vexatious delays to creditors seeking to enforce claims against their debtors. On the other hand, not every casual and temporary excursion of a resident from the State can convert him into an absentee, and render him liable to be harassed by his creditor, who, to gratify improper feelings, might resort to unnecessary acts to injure him. But where in a case like the present, the debtor is absent two or three years, has property in the State, but who leaves no housekeeper, or person upon whom a citation can be served, has no agent to represent him, it would be leaving him a large margin for the procrastination of payment of his debts to permit him under such circumstances to plead that he had a domicile in the State and argue his right to personal citation, when for so long a period he was absent and had left no person upon whom a citation could be served. We think such a perversion of terms inadmissible. That the appointment of a curator *ad hoc* in a case like the present, is clearly within the scope and intendment of our law, there can be no doubt. Neither is it in conflict with the spirit of our jurisprudence."

The facts in the case before us are, as we have seen, that Lasere, the plaintiff, left New Orleans about the last of May, 1863, went to Mobile and there resided until April, 1865, a period of near two years; that he left no housekeeper, nor representative of any kind in New Orleans, upon whom process could be served. His notes, secured by mortgage, were due on the seventeenth of February, 1863. It was not until the twenty-fourth of November, of that year, that his creditors instituted proceedings against him. These proceedings throughout seem to have been regular. It is not alleged that fraud, or undue means were resorted to by the creditors to attain an advantage over their debtor during his absence. It is averred that the property sold was worth eighteen thousand dollars and brought only six thousand and fifty dollars. There is no evidence that there was a sacrifice of the property. The creditors were not purchasers and derived no benefit from the sale beyond that of realizing their debts. It was not their fault, if owing to the existence of war there was a depression in the value of property.

In the case of *Samory v. Montgomery*, quoted above, the proceedings were *via ordinaria*. It is in most of its features similar to the present case, from which it differs chiefly in this, that the case before us partakes more of the character of a proceeding *in rem*.

Applying the principles to which we have adverted to the facts of the case at bar, we conclude that the appointment of a curator *ad hoc* was legal and regular.

It is therefore ordered, adjudged and decreed that the judgment of the Sixth District Court be affirmed with costs.

Rehearing refused.

Mr. Justice Howell recused.

Helen Dewey v. T. J. Bird, Sheriff, et al.

No. 2085.—HELEN DEWEY v. T. J. BIRD, Sheriff et al.

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All parties to the record interested in maintaining the judgment appealed from, must be made parties to the appeal, otherwise the appeal will be dismissed.

APPEAL from the Fifth Judicial District Court, Parish of East Baton Rouge, *Posey, J. Knickerbocker & Joor*, for appellant. *Dunn & Heron and Burgess, Chaney & Fuqua*, for appellee.

TALIAFERRO, J. A motion is made to dismiss the appeal in this case, on the ground that the bond is not for an amount sufficient to authorize a suspensive appeal, and that no appeal bond is given in favor of Stewart, one of the defendants.

The defendant Stewart, made a party and cited by the plaintiff in the court below, is not included in the appeal bond.

That all parties to the record interested in maintaining the judgment appealed from, must be made parties to the appeal, has been long settled, and needs no reference to authorities.

It is therefore ordered that this appeal be dismissed at the costs of the appellant.

No. 1478.—MRS. P. R. WALKER v. MRS. D. S. GRAHAM.

Consent to the extension of the time for the maturity between the maker and holder of a promissory note will hold the endorser conditionally liable, and notice of demand on the maker need not be given the endorser until the expiration of the new date caused by the extension.

APPEAL from the Sixth District Court of New Orleans, *Duplantier, J. Randolph, Singleton & Hardie*, for plaintiff and appellee. *Charles S. Rice* for defendant and appellant.

HOWELL, J. The defendant, universal heir and legatee of her deceased husband, D. S. Graham, has appealed from a judgment against her on a note for \$2100, made payable on the first April, 1862, on which the following endorsements appear :

“NEW ORLEANS, March 1.”

“I hereby agree, and the payment of this note is extended for twelve months from the first day of April next.

“PATSY R. WALKER.”

“I hereby waive demand, protest and notice of protest, and consent to the above extension of twelve months.

“D. S. GRAHAM.

“March 1, 1862.”

“Received on account of the within note one hundred dollars, at Mobile, Ala., this thirteenth day of February, 1864.

“PATSY R. WALKER.”

It is contended by the appellant that the waiver of D. S. Graham, the endorser, related to the maturity of the note as fixed on its face, and not to the extended maturity.

Mrs. P. R. Walker v. Mrs. D. S. Graham.

This, in our opinion, is a forced interpretation of the agreement, and is not sustained by the sections of Story on Notes referred to. Sections 271, 272, 279, 295, 358, 364, 366.

As the extension, without the consent of the endorser, would have released him, a presentment and notice at the original date of maturity would have had no legal effect, and the parties are not presumed to have done a vain thing. The endorser consented to the prolongation and waived the demand, protest and notice at the new date of maturity.

We do not agree with defendant's counsel that to make the agreement for an extension between the maker and holder valid, the endorser was required first to waive presentment and notice at the old date. A simple consent to the extension would have held him conditionally bound, with the obligation on the part of the holder to pursue the steps at the new date of maturity necessary to bind an endorser. It was this obligation, of which the holder was relieved by the waiver made.

The appellant is entitled to reduction of the judgment for the credit on the note, with costs of appeal. C. P. art. 903. The plaintiff asked for the judgment as rendered, and introduced the note in evidence with the credit on it. It was her duty, as much as that of defendant, to have the correction made below. To hold otherwise would justify plaintiffs in demanding and recovering more than their own evidence sustains. This case differs from that of *Baudoin v. Tete*, 10 A. 69, quoted by plaintiffs to relieve them from costs.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiff, Mrs. Patsy R. Walker, recover of the defendant, Mrs. D. S. Graham, widow of D. S. Graham, deceased, the sum of two thousand dollars, with eight per cent. interest on two thousand one hundred dollars, from April 1, 1862, until February 13, 1861, and like interest from said last date on two thousand dollars until paid, and costs of the lower court. Costs of appeal to be paid by plaintiff and appellee.

No. 2027.—F. A. COUSIN & BROTHER v. S. JOHNSON.

When more than three judicial days have elapsed after the time fixed by the District Judge for filing the transcript and no cause is shown for the delay, the appeal will be dismissed on motion of the appellee.

APPEAL from Fifth District Court, parish of Orleans. *Leaumont, J. E. Bermudez*, for plaintiffs and appellees, *G. Schmidt*, for defendant and appellant.

HOWELL, J. A motion is made to dismiss this appeal on the ground that the transcript was filed in this court for more than three judicial days after the return day fixed by the District Judge. The appeal was obtained on the eighth December, 1868, and made returnable on the second Monday (eleventh day) of January, 1869. The transcript was filed on the twenty-ninth January, 1869, and no application for an extension of the time for bringing up the appeal was made and no cause shown for the delay. Under these circumstances the motion must prevail. 18 A. 651; 10 A. 75; 4 A. 350.

Appeal dismissed.

J. McWilliams v. Bryan & Irvine.

No. 1464.—J. McWILLIAMS v. BRYAN & IRVINE.

A contract or partnership between two parties, the one residing within the Federal lines of military occupation and the other within the lines of the insurrectionary forces, during the late war, for the purpose of carrying on a commercial business in the purchase and sale of cotton between the contending parties, was in conflict with the act of Congress of July 13, 1861, prohibiting all commercial intercourse between the contending parties. The rights and obligations growing out of such business relations being in contravention of a prohibitory law cannot be judicially enforced.

APPEAL from Fifth District Court of New Orleans. *Leaumont, J. G. L. Bright and Barrow & Pope*, for plaintiff and appellant, *J. P. Dillingham and J. M. Bonner*, for defendants and appellees.

TALIAFERRO, J. The plaintiff alleges that the defendants, as commercial partners, are indebted to him in the sum of eighty-six thousand five hundred and forty-seven dollars and thirty-five cents with five per cent. interest thereon from the twenty-third of October, 1865. He predicates this indebtedness upon an alleged contract entered into on the tenth of February, 1864, by which the defendants sold to him 869 bales of cotton, every bale to weigh 400 pounds, for which he was to pay twenty-five cents per pound. He avers that he did pay in cash at the time twenty cents per pound, making the sum of sixty-nine thousand five hundred and twenty dollars, that defendants delivered the amount of thirty-two thousand five hundred and seventy-two dollars and sixty-five cents worth of cotton, expenses deducted; that 496 bales have not been delivered, and from the failure of the defendants to deliver them plaintiff has been damaged twenty-five cents per pound on the cotton which they have so failed to deliver, this being the difference between the price stipulated to be given and that which it would have brought on the twenty-third of October, 1865.

The defendant, Irvine, was alone cited. He answered by specially denying that a partnership existed between himself and Bryan, as alleged by plaintiff, and by charging that at the time of entering into this alleged contract (tenth February, 1864), the contracting parties resided on opposite sides of the lines between the territory at that time occupied by the Federal and insurrectionary forces during the late war; that the trade carried on by them was forbidden by law, and consequently that no engagements that may have been entered into at the time and under the circumstances relating to the transactions now by this suit brought into view can have any legal or binding effect. There was judgment in the court below dismissing the action of the plaintiff, and he prosecutes this appeal.

An attentive perusal of the voluminous record presented in this case satisfies us that the question of partnership so elaborately discussed by counsel will not require at our hands any special scrutiny. Neither will the bills of exception taken in regard to the admission of evidence, of which we find two in the record, need to be examined for the pur-

pose of deciding upon them. We therefore pretermit any inquiries on these subjects, and shall confine ourselves to the issue involving the legality of the transactions lying at the foundation of the controversy between the parties.

At the date of these transactions war existed in the country. Portions of the State were in the military occupancy of the national forces, and portions held in the same manner by the insurrectionary power. This was during the year 1864, in the early part of which the cotton arrangements between these litigants took place. Under the act of Congress of thirteenth July, 1861, all commercial intercourse between the inhabitants of a territory in insurrection and those of a territory not in insurrection, except under the license of the President and according to regulations prescribed by the Secretary of the Treasury, was entirely prohibited. See Statutes at large, vol. 12, p. 257.

On the eleventh of September, 1863, the Secretary of the Treasury promulgated a series of trade regulations, authorized by the act of Congress we have referred to, and among these regulations it is provided that "commercial intercourse with localities beyond the lines of military occupation by the United States forces is strictly prohibited, and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States." In pursuance of the act of Congress of thirteenth of July, 1861, authorizing it, the President of the United States on the sixteenth of August of that year issued a proclamation declaring certain States, among which was the State of Louisiana, to be in a state of insurrection. Several localities were exempted from its operation. Among them were such parts of the States mentioned, "as may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents." See Statutes at large, vol. 12, page 1262, appendix.

In what localities at the time of these cotton contracts did the parties to them reside? The petition in its outset avers that "the commercial firm of Bryan & Irvine sold to plaintiff on the tenth day of February, 1864, by written contract 169 bales of cotton," etc. Pilcher, one of the witnesses, says: "McWilliams resided at Plaquemines in February, 1864," and that "Plaquemines was at that time within the Federal lines." General Sheldon, an officer of the United States army, says: "I went to Plaquemine twenty-first November, 1863, and remained continuously every day until twenty-sixth or twenty-seventh of March, 1864. Plaquemine was occupied by the Federal forces, and was wholly within the picket lines of my command. From the time I went there Plaquemines was continuously occupied by the Federal forces until the surrender. McWilliams resided at Plaquemine and kept a store there; told me soon after I went there he had taken the oath of allegiance." McWilliams, it is elsewhere in the record shown, took the oath of allegiance to the United States in November, 1862. It appears that David

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N. Barrow was the agent in the greater part of these transactions of the plaintiff. Hamilton, a witness, says: "In February, 1864, Irvine lived in Woodville, Mississippi; I lived there then myself." Scott, a witness, testifies that "Irvine resided during the war within the military lines of the Confederates." Shields, another witness, states that "Barrow bought of Irvine between the first and tenth of February, 1864, a lot of cotton. At that time Irvine lived in Confederate lines and Barrow in Federal lines." This purchase of cotton spoken of by Shields, there cannot be a remaining doubt, is the one alleged by plaintiff to have been entered into on the tenth of February, 1864. The effort of plaintiff to show that only a fort erected by the Federal forces at Plaquemine was within the Federal lines is weak and abortive. We think the evidence establishes fully and conclusively that McWilliams, the plaintiff, at the time of the contract declared upon was residing in Plaquemine; that his residence there was a fixed residence from the fact of his having taken the oath of allegiance to the United States, and having a store and selling merchandise there, which he no doubt did by permission of the Federal authorities. It is equally established beyond doubt that Bryan & Irvine, at the time of their negotiations in cotton with McMasters & Barrow, were permanent residents within the so-called Confederate lines. It is clear then that the contract sought to be enforced by this action was entered into in contravention of a prohibitory law, and cannot therefore have legal effect. This court has repeatedly declared that it will entertain no action of this sort founded in derogation of peremptory law.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 2159.—CITY OF NEW ORLEANS v. MERCHANTS MUTUAL INSURANCE COMPANY.

The appeal will be dismissed if the transcript is not filed in the Supreme Court within three judicial days after the time allowed the appellant to bring up the record.

A PPEAL from the Seventh District Court, parish of Orleans, *Collens, J. F. Michinard*, for plaintiff and appellant, *A. & M. Voorhies*, for defendant and appellee.

TALIAFERRO, J. The motion to dismiss this appeal must prevail. The transcript of proceedings in the lower court was not filed in this court within three judicial days after the time allowed for the appellant to file the record.

It is therefore ordered that this appeal be dismissed at costs of the appellant.

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No. 1469.—WILLIAM THIEL v. C. M. CONRAD.

Where a promissory note is made payable at a particular place, as a bank, in an action against the maker it is not necessary to allege or prove that demand of payment was made at that place to enable the holder to recover. 5 An. 61.

The maker of the note may, however, when sued, set up in defense that he had deposited the funds in the bank to meet the note at maturity, and show the damages he has sustained by the failure of the holder to demand payment at the place designated.

APPEAL from the Third District Court of New Orleans, *Fellowes, J.* *John E. Holland*, for plaintiff and appellant, *C. M. Conrad & Son*, for defendant and appellee.

HOWE, J. The plaintiff enjoined the execution of a writ of seizure and sale issued in executory proceedings for the collection of certain promissory notes secured by mortgage and vendor's privilege. His petition alleges two grounds for the injunction.

First.—That at the maturity of the notes he tendered payment, and that therefore the interest demanded from maturity could not be lawfully claimed.

Second.—That the payee of the notes, defendant in injunction, was engaged in the service of the "so-called Confederate States," as a member of Congress; that payment of the notes to him at their maturity and during the war was forbidden by law and general military orders, and that therefore the interest demanded after maturity could not be lawfully claimed.

The answer was a general denial, with prayer for damages against both plaintiff and his surety. There was judgment in favor of defendant, dissolving the injunction, with damages against the plaintiff alone, and the plaintiff alone has appealed.

As to the first ground of injunction the court *a qua* did not err. There was no sufficient evidence of a tender to suspend the accruing of interest. Two of the notes fell due May 1, 1862, and were by their terms payable at the Union Bank. If we give the fullest effect to the testimony on behalf of plaintiff we find that when these two notes fell due he went with one witness and offered to pay the notes with a check of another person on the Citizens' Bank, but was told that the notes were not there, and the note teller declined to take the check. There was no tender in lawful money, nor was there any consignment of the amount due. C. C. 2163, 2164; C. P. 404 to 418; 6 La. 19; 4 R. 146; 2 An. 441, 496; 14 An. 327.

As to the other two notes, falling due in 1863, there was no attempt to show that any tender was made.

Upon the second ground of injunction the court did not err. There was no evidence adduced to establish the allegations in regard to the defendant, and we are not aware of any rule of law which authorizes us to take judicial notice of the actions of private individuals. It is

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therefore unnecessary to consider what effect the proof of this averment would have.

It is urged by plaintiff that the notes were payable at the Union Bank; that no demand was made there until long after maturity, and that for this reason the interest of eight per cent. stipulated after maturity cannot be recovered. If we admit that this point can be raised under the pleadings in this case, we reply that in the first place there is evidence to show that the agent of defendant presented the notes at the Union Bank for payment as they fell due; and in the second place, if the testimony of the agent be considered as not establishing this fact, the theory of the plaintiff is incorrect in law. We consider it as well settled in this State since the case of *Ripka v. Pope*, 5 An. p. 61, that where a promissory note is made payable at a particular place, as a bank, in an action against the maker it is not necessary to allege or prove that a demand of payment was made at that place to enable the plaintiff to recover; and that to found a defense upon a want of such demand the defendant (or in this case the plaintiff in injunction) must show some resulting injury. If the maker show that he had funds at the appointed place at the appointed time, he might be exonerated from interest thereafter. If he show that he has sustained actual loss in consequence of non-presentment, as if the note be payable at a bank, and he deposit funds there to meet it, and they are lost by the failure of the bank, such loss might be pleaded in defense. But in this case there is no evidence of this sort. Story on Promissory Notes 3228; Parsons on Bills, vol. 1, p. 309 and notes; *McCollop v. Flaker*, 12 An. 551; *Catalonge v. Alva*, 13 An. 99; *Stokes v. Forman*, 12 An. 671.

Upon the trial in the court below the plaintiff offered the record of the executory proceedings to show that the notes and act of mortgage were not stamped and that two of the notes had been restricted by a special endorsement, and that the order of seizure and sale was therefore irregular, and the defendant objected. The court admitted the record in evidence with the reservation "that if in an examination of the pleadings said record was not relevant to the issues presented it would not be allowed to weigh with the court in making up its judgment," and the defendant excepted. The court in its judgment attached no weight to the evidence, and we think properly, inasmuch as the plaintiff in his petition for an injunction made no such averments as he thus sought to establish.

The defendant has asked for an amendment of the judgment so as to condemn the surety on the injunction bond *in solido* with the plaintiff, but the surety is not before us.

For the reasons given it is ordered and adjudged that the judgment appealed from be affirmed with costs.

Rehearing refused.

 Jeanne Bister et al. v. Anton Menge.

No. 1461.—JEANNE BISTER et al. v. ANTON MENGE.

The power of the husband to dispose of the community property is limited to that of alienation by sale or otherwise where an equivalent in value is impliedly received for the property disposed of.

The husband is prohibited from making any conveyance *inter vivos* of the immovables of the community by a gratuitous title.

At the dissolution of the community the wife is entitled to one-half of the immovables disposed of by the husband, by onerous titles in fraud of her rights, and she may enforce them directly against the parties in possession.

Where a party in possession of immovable property by a gratuitous title is sought to be evicted, he cannot invoke the plea of prescription nor call the donor in warranty.

A lease by the husband of immovables belonging to the community for a term of years, in the form of a donation *inter vivos*, will fall if the donor dies before the expiration of the time.

APPEAL from the Second Judicial District Court, parish of Plaquemines. *Cazabat, J. Collens & Wooldridge* and *James Foulhouse*, for plaintiffs and appellants. *C. Roselius* and *Sambola & Ducros*, for defendant and appellee, *E. H. McCaleb*, for warrantor.

TALIAFERRO, J. Jeanne Bister, the widow of Joseph Laussade, and Eliza Laussade, her grand daughter, as plaintiffs, prosecute this action to recover from the widow and heirs of Anton Menge two arpents and a half of land, constituting a small portion of a tract containing four hundred and forty arpents lying on the Mississippi river in the parish of Plaquemines, and belonging to the community that existed between the widow Bister and her husband Joseph Laussade. By the partition of this land between the widow and the only heir of Laussade the part of the tract including the two and a half arpents fell to Mrs. Bister, who donated it to Eliza Laussade the coplaintiff in the case and the party principally interested in this suit.

In February, 1851, Joseph Laussade executed before a notary and witnesses an act called a lease, by which he granted to Anton Menge the use of the two and a half arpents for the period of twenty years. The only conditions stipulated were as expressed in the act "that all trees and shrubbery that might be planted hereafter in and upon the said tract of land above described shall be the property of said Laussade, the said Menge having the right to gather the fruits of said trees, and in the event of the said Menge his wife and children leaving the above premises before the expiration of the said twenty years, he, she or they shall have the right only to take away from the said land said buildings and other improvements, as he, she or they might have constructed and built on said land above described. The said Menge shall have no right to sublease or underlet the property above described; and on him, his wife and children leaving the same, the said property shall be surrendered together with the trees, shrubberies and fruit trees thereon planted to the said Laussade, his heirs and assigns, with the exception of the buildings thereon."

Laussade died in 1854. The land was partitioned in January, 1866, and in August following this suit was instituted. It is contended on

the part of the plaintiffs that the act in question was a mere donation of the usufruct of the premises described. That the land being community property the husband could legally make no disposition of it gratuitously; that the act ceased to have any effect after his decease; that the wife was no party to the act, never having signed it, and, as averred, ignorant even of its existence. It is also urged that this act if capable at all of any legal effect, is utterly null and without effect against the wife as well as against third parties generally, as it was never recorded.

On the defense it is argued that the act is valid, as even by the admissions of plaintiffs, it was not done in fraud of the wife's rights. That the failure to record cannot avail the plaintiffs, as the wife is not a third party to the acts of the husband. The defendants called the heir of Laussade in warranty and pleaded in bar of the action the prescriptions of one and ten years. The verdict of the jury before whom the case was tried, maintains the defendants in possession to the end of the term specified in the act, without the right to remove the buildings and improvements made by them upon the premises. The plaintiffs appealed and the defendants ask this court to amend the judgment of the lower court by allowing them to remove the buildings and improvements according to the contract.

The act under consideration we regard as a donation *inter vivos*; and affecting as it does community property, the principal inquiry involved in the case is, has the act any legal effect?

Article 2373 of the Civil Code obviously limits the power of the husband to dispose of the real estate of the community to acts of alienation by sale or otherwise, where an equivalent in value is impliedly received for the community property disposed of.

The second paragraph of that article strictly prohibits him from making any conveyance *inter vivos* of the immovables of the community by gratuitous title. The fourth paragraph construed in connexion with the second, can only be taken to contemplate a recourse of the wife against the heirs of the husband in cases where he has alienated the immovables of the community by onerous title in fraud of her rights. The case of the disposal of the immovables of the community by gratuitous title is provided for in the second paragraph by absolute prohibition. The prohibition is unconditional and wholly independent of the interest of the husband in making the donation. Where he disposes of the immovables of the community by onerous title, the wife's right to pursue the heirs depends upon the question whether the alienation was made in fraud of her rights or not. In the case of his disposal of immovables by gratuitous title no such test applies. The law in this case accords to the wife no recourse against the heirs of the husband. At the dissolution of the community arises the recourse of the wife against the heirs of the husband for one-half

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the value of the immovables of the community disposed of by him under onerous title in fraud of her rights, and to recover directly from the parties in possession her share of the immovables disposed of by the husband by gratuitous title.

The case of the heirs of Reine Trahan v. Michael Trahan et. al., 8 An. 455, relied upon by the defendants, we think not applicable to the present case. There, the wife joined the husband in the act of emancipation of a slave "in consideration of his long and faithful services." The brief remarks of the court in that case touching the right of the husband to alienate community property ought perhaps rather to be regarded as *obiter dicta* than as intended to establish a fixed rule on the subject.

The defendants being without title and in possession by the gratuitous act of Laussade, their call in warranty and pleas of prescription cannot avail them.

It is sufficiently clear from the evidence that the donation had its origin in the kind feelings of the donor towards Menge, who it is shown was in other respects the recipient of favors and benefits coming gratuitously from the same source. It equally appears that the widow and heir of his benefactor, after his decease in 1854, continued to extend to Menge and his family for ten or twelve years a very commendable degree of liberality and forbearance. The orange trees planted by Menge in 1851, had come to maturity and yielded him a handsome revenue for at least five or six years before the institution of this suit. One witness states that Menge's crop of oranges for the year 1865, brought \$600, and for the year previous \$1,800. The large sum claimed by defendants as damages in case of eviction we apprehend is neither founded in law or equity. The plaintiffs pray judgment for the value of the fruits of the property from the time of the institution of the suit. The evidence adduced does not enable us to fix satisfactorily the amount if any that should be accorded.

It is therefore ordered adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered, adjudged and decreed that the plaintiffs recover from defendants the possession of the land and premises sued for, viz: Two arpents and a half of land described in the petition, the same now and heretofore occupied by defendants under the act purporting to be a lease from Laussade to Menge executed in 1851; that defendants deliver possession of the same to plaintiffs with the appurtenances thereunto belonging, reserving to the defendants the right to remove from the premises the buildings and structures of every kind which they have placed upon the said land. There is likewise reserved to the plaintiffs the right to prosecute their claim for the fruits as set forth in their petition.

It is further ordered that all costs of these proceedings be borne by defendants.

Rehearing refused.

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No. 1473.—ALEXANDER CARDAILLAC v. BERNARD DUTHU.

The verdict of the jury unsupported by the evidence in the record will be set aside on appeal, and the judgment rendered thereon will be annulled and the suit dismissed.

A PPEAL from Sixth District Court of New Orleans. *Duplantier, J. E. & C. Morel*, for plaintiff and appellee, *Julian Michel & Jules Lambert*, for defendant and appellant.

WILY, J. Plaintiff sued the defendant for a sum of money, which he alleges is a balance due him on account of a partnership between him and the defendant during the year 1863, which partnership has never been settled. He sued for a settlement of that partnership, claiming that the defendant has all the books and assets thereof and refuses to settle with him. He also sued out a writ of arrest against the defendant, alleging that he was about to remove from the State without leaving sufficient property to satisfy his demand. The answer is a general denial; a special denial that the plaintiff placed in defendant's hands any sum of money to be invested, and special denial that there ever was in his hands any books, papers or assets, as alleged by plaintiff, and a reconventional demand for damages on account of his illegal and wrongful arrest.

There was judgment for plaintiff for \$2080 70, and the defendant has appealed. The case was tried by a jury and the judgment rendered in accordance therewith.

There was evidence of the partnership, but not a particle of proof to sustain the verdict that the defendant owed plaintiff the sum of \$2080 70 or any other sum.

One of plaintiff's witnesses, Henry Pedaré, knew of the transaction of a small lot of cotton, the proceeds of which he divided between the plaintiff and defendant.

Another witness for plaintiff, Alexis Dumestre, knew of the partnership, and that cotton was the principal commodity in which they transacted business; he was employed by them to collect the cotton; having sold two lots of it, he paid to plaintiff and defendant each his share. Another of plaintiff's witnesses, François Corre, also knew of the transactions between plaintiff and defendant in reference to cotton. He states that a committee was appointed, of which he was one, to settle the accounts between plaintiff and defendant, in reference to transactions in hides and cotton. He says: "It was agreed that Mr. Duthu would pay Mr. Cardaillac a certain sum of money, the amount of which I do not remember, but believe to be between fifteen and seventeen hundred dollars. One of the members of the committee on that occasion bound himself as surety of Mr. Duthu to Mr. Cardaillac, this surety stating that he would the following day pay to Mr. Cardaillac the amount, and I believe the amount was the following day paid to Mr. Cardaillac."

The testimony of the other witnesses is vague and indefinite, and there is no positive evidence to sustain the judgment for the sum re-

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covered. We think the plaintiff has failed to make out his case, and the judgment appealed from is erroneous.

It is therefore ordered that the judgment of the court below be avoided, annulled and reversed, and it is now ordered that there be judgment as of non-suit against the plaintiff, and that he pay the costs of both courts.

Rehearing refused.

No. 2076.—LOUIS FAVROT v. MARTIN METTLER et als.

The lessee cannot make repairs on the premises leased at the expense of the lessor without first putting him in default.

APPEAL from the Fifth District Court, parish of East Baton Rouge. *Posey, J. Favrot & Lamon*, for plaintiff and appellant, *Fuqua & Callahan*, for defendants and appellees.

LUDELING, C. J. The plaintiff leased to the defendant his house, situated in Baton Rouge, for the period of three years, at an annual rent of one thousand and eighty dollars, payable in equal installments, on the first day of each month.

The contract is in writing. It simply stipulates that Favrot lets the premises for the price and term above stated, and that the lessee binds himself to pay the price and to take good care of the property.

The defendants made repairs on the premises, and when the plaintiff demanded payment of the rent at the beginning of the fourth month of the lease the defendants presented accounts paid by them for repairs, which they had caused to be made on the premises, some of which were rejected by the plaintiff, and defendants refused to pay the rent. Thereupon the plaintiff instituted this suit to recover of defendants one hundred and sixty-seven dollars for rent due, and one thousand dollars damages caused by the failure of defendants to comply with the terms of the lease.

The items rejected by the plaintiff in defendants' account pleaded in reconvention to plaintiff's demand, are \$46 for painting and \$150 for plastering.

The first question to be decided is, can the lessee make repairs on the premises leased, and charge the lessor for them, without having requested him to make the repairs?

Article 2864 of the Civil Code says: "If the lessor do not make the necessary repairs in the manner required in the preceding article, *the lessee may call on him to do it. If he refuse or neglect to make them the lessee may himself cause them to be made, and deduct the price from the rent due on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable.*"

"The owner of houses would soon be ruined, if it were permitted to every tenant to make such repairs as his fancy or caprice might dictate, without notifying the owner of the property of the intention." 8 R. 171; 5 An. 713; 5 An. 628.

Louis Favrot v. Martin Mettler et als.

The question is well settled that the lessee cannot make repairs at the lessor's expense without first putting the landlord in default.

There is no proof that the lessee ever called on the lessor to make the repairs, the price of which is claimed of him. Hence the lessor is not bound for the price of the repairs.

It appears, however, from the statements and admissions of the plaintiff that he gave defendants credit for the price of the repairs, for which he thought he was responsible, and he sued for the balance of the rent due. In his brief the plaintiff further consents that the item for thirty dollars for glazing should be deducted from the rents.

We do not think there is any ground for allowing the damage claimed.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the plaintiff against the defendants *in solido* for the sum of one hundred and thirty-five dollars, with the lessor's privilege upon the furniture, fixtures and other property provisionally seized in this case on the leased premises, and that the same be sold to satisfy this judgment. It is further ordered that the defendants pay the costs of both courts.

No. 1434.—JOHN W. BARRY v. WM. S. PIKE.

A mandatary who has communicated his authority to a person with whom he contracts in that capacity, is not answerable to the latter for anything done beyond it.

A mandatary is responsible to those with whom he contracts only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers.

Where the evidence in the record leaves the question of fact in doubt as to whether the agent is personally responsible on a note which he has given, the case will be remanded for the purpose of receiving further testimony on the point.

21	221
107	180

A PPEAL from the Sixth District Court of New Orleans. *Duplantier, J. Cooley & Phillips*, for plaintiff and appellee. *Hays & New*, for defendant and appellant.

HOWE, J. This suit was instituted upon the following note:

"\$3357 07. BATON ROUGE, March 27, 1862.

"Six months after date we promise to pay to the order of W. D. Phillips, Esq., and at the branch of the Louisiana State Bank, Baton Rouge, thirty three hundred and fifty-seven dollars and seven cents, in full for ninety bales cotton purchased this day.

"S. M. HART & CO."

The note was endorsed by its payee, and transferred to plaintiff long after maturity, and the case is therefore to be decided as if the suit had been brought by the payee.

The answer admits that the defendant "was a member of the firm of S. M. Hart & Co., which in the year 1861, on the failure of the Legislature of Louisiana to make provision for carrying on the State Penitentiary at Baton Rouge, was appointed by Governor Moore agents of the State to conduct said Penitentiary, and to perform such acts and

make such purchases as were necessary to keep the convicts therein employed, and thus save the State the expense of their maintenance. That as such some cotton was purchased of W. D. Phillips, of Baton Rouge, and the note herein sued on given as an evidence of a claim against the State of Louisiana.

"That Phillips, a resident of Baton Rouge, was well acquainted with all the facts; that in selling said cotton he knew that S. M. Hart and respondent were acting as agents of the State of Louisiana in purchasing the same, and that credit was given to the State and not to S. M. Hart & Co., and that S. M. Hart & Co. in no way held themselves out as principals, but in all respects conducted themselves as agents, and that if the note in question is not signed 'as agents' by S. M. Hart & Co., it was due to a clerical error, and with no intention of executing any other obligation than one against the State of Louisiana."

There was judgment for plaintiff, and defendant has appealed.

It appears in evidence that at the same time the note was executed the payee, Phillips, signed the following bill and receipt:

"S. M. Hart & Co., Agents Louisiana Penitentiary:

"To W. D. PHILLIPS:

"For ninety bales cotton, 39,495 lbs., at 8½ cents.....\$3,357 07
Commissions 2½ per cent..... 83 93

\$3,441 00

"Received, Baton Rouge, March 27, 1862, of S. M. Hart & Co., agents Louisiana Penitentiary, their note at six months for the sum of thirty-three hundred and fifty-seven and seven one-hundredth dollars, being for amount of above bills. . . . W. D. PHILLIPS."

The commissions in this bill were inserted by way of memorandum, in keeping the account between the State and S. M. Hart & Co., purchasing agents, as by the terms of their employment they were to receive two and a half per cent. for buying, and are not included in the amount of the note.

The defendant has introduced evidence to show that the firm of S. M. Hart & Co. was established solely for the purpose of acting as agents for the State in managing the business and mechanical departments of the Penitentiary, and had no other existence or purpose; that the fact was well known in Baton Rouge; that Phillips was an intimate business and social acquaintance of defendant; that the cotton in question was purchased for account and use of the State, and so charged on the books of the agents, and was manufactured into cotton goods for account of the State.

As stated by counsel on both sides, the main question in the case is, to whom was the credit given in this transaction? Upon the strength of the bill and receipt signed by Phillips at the time, and other evidence in the record, the defendant strenuously contradicts that the credit was given to the State, and that the holding of S. M. Hart & Co. to a personal liability on the note did not enter into the contemplation of the parties at the time the note was made.

John W. Barry v. William S. Pike.

In the case of *Selaroderie v. Hart*, 20 An. p. 123, it was held that where the defendants, as agents for the Penitentiary, contracted with plaintiffs for a lot of lumber to be used in moving the machinery, and the bill for the price of the lumber was made out against them as agents, they could not be held personally liable, the plaintiffs having admitted their agency, and dealt with them in their representative capacity.

We do not perceive that this case differs from that, except in the fact that the note was given; and it cannot be doubted that the origin and consideration of that note may be inquired into in the hands of the plaintiff, who took it some three or four years after it fell due. We think the law has been well settled in this State since the case of *Krumhaar v. Ludeling*, 3 Martin 644. That of the defendant, maker of a note, shows that he was a mere agent throughout the whole transaction, and that within the knowledge of the plaintiff or of the payee in a case like this, the note is not binding on him, "because in the language of the court in that case he is not a party to the contract, and as far as it relates to him it is without consideration; and the attempt to enforce it is a violation of that evident justice and good faith which ought to direct and govern in all contracts." 10 L. 300; 11 L. 13; 3 R. 381.

It is, however, contended by plaintiff that S. M. Hart & Co. exceeded their authority in making the note, and they must therefore be personally bound by that note on the general principles of the law of agency in this regard. But we apprehend that the reason of the rule that an agent who exceeds his authority is personally bound, is that he misleads the party with whom he contracts, and is therefore held on the ground of misrepresentation. The reason of this rule being absent, the rule ceases. It is provided, therefore, by the Civil Code (2981-2) that "the mandatary who has communicated his authority to a person with whom he contracts in that capacity, is not answerable to the latter for anything done beyond it, unless he has entered into a personal guarantee;" and that "the mandatary is responsible to those with whom he contracts only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers." And, therefore, in the case of *Trastour v. Fallon*, 12 An. p. 28, this Court said in discussing a similar question, that "to hold the defendant's liable the plaintiff must show that he contracted with them personally, or that they misled him by assuming to act for others without sufficient authority."

If S. M. Hart & Co. exceeded their authority in making the note in suit, and yet the limitations of that authority were known to the payee, the plaintiff could not, on that ground simply, recover; and on the other hand, if the note by which the plaintiff claims that S. M. Hart & Co. bound themselves personally, was given as claimed in the answer, the plaintiff in the authority of *Krumhaar v. Ludeling* and the subsequent decisions, could not, on that ground alone, recover.

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The question still recurs, to whom was the credit given? Upon the record as it comes to us, we do not feel justified either in affirming the judgment, or in rendering a judgment in favor of defendant. It seems to be one of those cases which justice requires to be remanded, in order that the main question as a question of fact may be settled by further testimony. C. P. 906.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed, and that the cause be remanded for a new trial, the appellee to pay the costs of the appeal. *

No. 1453.—LORIN CHAPMAN v. THE NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY.

Where a railroad company engaged in the carrying trade as common carriers for hire receives and receipts for property to be transported to another point on the line of the road, the burden of excusing its non-delivery at the point designated falls on the company. A judgment of the District Court not regular in form will be annulled on appeal, and such judgment as should have been rendered by the judge *a quo* will be pronounced by the Supreme Court.

APPEAL from the Fourth District Court of New Orleans. *Theard, J. Marr & Fouts*, for plaintiff and appellee, *L. E. Simonds*, for defendants and appellants.

HOWE, J. The plaintiff sues to recover the value, at Jackson, Mississippi, of a shipment of sugar and molasses delivered to the defendants at Hammond Station, on the twenty-fifth April, 1863, to be transported by the latter to Jackson. The shipment of the goods is admitted and the non-delivery at the place of destination. It also appears that the freight money was paid by plaintiff to defendants at Tangipahoa, a few miles beyond the point of shipment. The defense is that "at or near Tangipahoa Station the progress of said merchandise was arrested by "Grierson's raid," and the same for security from devastation by Federal troops was stopped at said station, and by the impossibility of proceeding farther on the road in consequence of military orders as well as by destruction of the road. That while said merchandise was then and there at Tangipahoa the same was destroyed by a military force acting under orders of Colonel Dumontiel, of the Confederate army, and lost by a '*vis major*,' by circumstances beyond the power of defendants to prevent and without any fault on their part."

There was judgment for plaintiff for the sum of \$1274 33 in gold or its equivalent in United States treasury notes with interest thereon from April 25, 1863, and defendants have appealed.

The reception of the property by defendants as carriers for hire imposed on them the burden of excusing its non-delivery, and the question whether the record establishes any legal excuse is mainly one of fact. The goods had apparently arrived as far as Tangipahoa on the twenty-

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fifth of April, 1863. From that place to the point of destination they might have been carried in a few hours, the distance being about one hundred miles. They were there unloaded from the cars, placed on a platform, and about the sixteenth of May following destroyed, as a witness informs us, by "Confederate soldiers, citizens and negroes, who knocked in the heads of the sugar hogsheads and helped themselves and carried off as much as they could." The witness continues:

"Colonel Dumontiel left the same day, before the destruction, with a few soldiers, being chiefly if not entirely his staff. The Federal cavalry came into Tangipahoa in less than an hour after the destruction of the sugar, and they burned the depot and platform, and what sugar and molasses had not been taken off before they came was burned with the depot."

This cavalry appears to have been not Grierson's but a force that came up from New Orleans.

F. Dumontiel testifies that during April and up to the sixteenth of May, 1863, he was in command of the post of Tangipahoa, and saw sugar and molasses lying out at the depot there. He states that the road was cut by Grierson's force between Tangipahoa and Jackson about the latter part of April, and certainly prior to the first of May. He does not fix the date, nor does he confirm the plea that the goods were destroyed by his orders. He states that before the road was cut by Grierson he had orders not to permit private freight to be transported on the Jackson Railroad, and notified the railroad officers, or employes, at Tangipahoa of such military orders, but of these orders and that notification he does not fix the date.

We have been referred by defendants to a "pictorial history of the war" to show that the Jackson Railroad was cut by Grierson's force on the twenty-eighth of April, 1863. If we admit that the date can be fixed by such method, we fail to discover in this or in the other facts of the case that the defendants have established any sufficient excuse for the non-delivery of plaintiff's property. There is no proof whatever that the property was destroyed by orders of Colonel Dumontiel, and it is not necessary therefore to determine what effect such orders would have had in law, if given and obeyed. There is no proof when military orders were given to forbid the transportation of private freight over the Jackson road, and it is unnecessary therefore to consider what effect they would have had in law if they had been connected with the date when the goods arrived at Tangipahoa. Admitting that the road was cut by Grierson's raid on the twenty-eighth of April, 1863, we find that three days were available to the defendants to convey the property from Tangipahoa to Jackson, a journey of a few hours. The goods arrived at Tangipahoa on the twenty-fifth April, and the freight money was there paid by plaintiff to defendants; and the record does not disclose any reason sufficient in law to justify the unloading at that

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station of the plaintiff's property and the exposure of it to the destruction which came some three weeks afterward.

The judgment would be in all respects affirmed if regular in form, and for the proper amount of interest. As it is admitted by plaintiff's counsel that the rights of his client would be satisfied by a judgment in lawful money for the sum fixed by the court as the value of the property, and as interest is due, not from the time of shipment but from judicial demand (5 Rob. 192), it is ordered and adjudged that the judgment appealed from be avoided and annulled, and that the plaintiff have judgment against defendants for the sum of twelve hundred and seventy-four dollars and thirty-three cents, with five per centum per annum interest from February 1, 1866, with costs of the lower court, and that the plaintiff pay the costs of the appeal.

Rehearing refused.

No. 1987.—MARIE JOSEPHINE LAPICE, Wife of JULES DELONGPRE FITZGERALD, v. P. M. B. LAPICE et al.

P. M. B. Lapice and others executed their promissory note for \$50,000 in favor of Marie Josephine Lapice for borrowed money. Marie Josephine Lapice afterwards made a marriage contract with Jules DeLongpre, in which among other stipulations this note for \$50,000 was specially set apart to her as her dowery, an accurate description thereof being given; they were subsequently married and the note passed into the hands of the husband. Held—That the stipulation of \$50,000 in the marriage contract was merely descriptive of the note, and not an estimation, and the note or its value did not fall into the community under article 2334 of the C. C., and the husband became chargeable with no particular sum on receiving it. The wife, properly authorized by her husband or the judge, may sue for in her own name and recover the amount of a note settled upon her by the marriage contract as dowery. C. P. 107. The appearance of the husband to authorize the suit concludes him from any demand he might have against the makers of the note.

The Judge of the District Court gave as reasons for judgment, "after hearing the evidence and argument of counsel and considering the law and the testimony adduced, and the reasons orally assigned, it is ordered, etc." Held to be a sufficient compliance with article 80 of the Constitution.

A PPEAL from the Fourth District Court, parish of St. James. *Beaurvais, J. L. Castera and Carleton Hunt*, for plaintiff and appellee, *Fellows & Mills, Legendre & Poché* and *E. R. Beckwith* for defendants and appellants.

WYLY, J. On the first of May, 1856, the defendants executed and delivered to the plaintiff their promissory note for \$50,000, due first of January, 1858, for borrowed money. In order to secure the payment thereof they executed a mortgage on their plantation in the parish of St. James.

The plaintiff, the payee of the note, subsequently married Jules de Longpré Fitzgerald, and by a marriage contract she constituted to herself in dowery this note together with other property. She finally instituted this suit, with the authorization of her husband, for the recovery of the amount due on the note and to foreclose the mortgage.

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The answer is a general denial and the prescription of five and ten years. The defendants subsequently filed a peremptory exception to plaintiff's right of action on the ground that by the marriage contract between plaintiff and her husband, "the note sued on and therein recognized as dotal property, was to be placed after the marriage in the control and under the administration of the husband, and plaintiff therefore cannot stand in court as plaintiff" to maintain this action.

There was judgment in the lower court in favor of plaintiff and the defendants have appealed.

The defendants contend that on the celebration of the marriage the note sued on fell into the community by virtue of an estimation thereof in the marriage contract under article 2334 of the Civil Code, which declares that, "If the dowery, or part of it, should consist in movable effects, *valued by the marriage contract* without declaring that the estimated value of the same does not constitute a sale, the husband becomes the proprietor of such movable effects, and owes nothing but the *estimated value* of the same."

We have carefully examined the marriage contract and cannot perceive any estimation or valuation therein of the note sued on.

The third article of the marriage contract declares that the future wife constitutes to herself in dowery, first, the sum of fifty thousand dollars, the amount of a note subscribed May 1, 1856, by Messrs. P. M. B. Lapice, J. Frank Lapice, Ambrose G. Lapice and Emile D. Lapice, her brothers, payable to her own order, January 1, 1858, and secured by mortgage on the plantation of said Messrs. Lapice, situated in this parish; the second, third and fourth clauses in said article refer to other property constituted as dowery without any valuation mentioned.

The fourth article of the marriage contract declares, that immediately after the expected marriage, the note of fifty thousand dollars, and the sum of six thousand five hundred dollars, which the future wife has just constituted to herself in dowery, will be delivered to the future husband who will give acquittance therefor, and will take charge of the same in order to account therefor according to law.

The expression, *the sum of fifty thousand dollars*, mentioned in the third article of the marriage contract, is immediately qualified by adding *the amount of a certain note* which is fully described as the note sued on. This remark cannot be construed to imply a valuation or estimation of the note, especially if taken in connection with the fourth article which says immediately after the marriage the *note of fifty thousand dollars*, and the sum of six thousand five hundred dollars which the future wife has just constituted to herself in dowery, etc. We can perceive no valuation of the note and do not think the husband became chargeable with any specific sum on receiving it. We regard the note as the dotal property of the wife and under article 2349 of the

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Civil Code the husband will not be answerable for failure to collect it when the same is not owing to his fault or neglect.

The next question to consider is, can the wife sue for the recovery of the note, her dotal property, with the authorization of her husband?

Article 2330 of the Civil Code provides that, "the husband alone has the administration of the dowry, and his wife cannot deprive him of it; *he may act alone in a court of justice* for the preservation or recovery of the dowry against such as either use or detain the same, but this does not prevent the wife from remaining the proprietor of the effects which she brought as her dowry." Article 107 of the Code of Practice declares that, "husbands have under their control the personal and possessory actions to which their wives are entitled, though they be themselves minors; therefore they *can proceed judicially* and in *their own name* in whatever relates to the preservation of the dotal property, which their wives have brought to them by marriage as well as to the recovery of debts due them, these being under their administration. But actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real right belonging to her, must be brought by the wife duly authorized by her husband, or by the judge if he fails to do it."

In a contract between the husband and the wife for the administration of the dotal property, the rights of the husband would prevail. He had the right to sue in his own name on the note herein declared upon, under the articles of the Civil Code and Code of Practice just quoted.

He may act alone in a court of justice for the recovery of the dowry against such as detain the same. C. C. 2330.

The law does not declare he must act alone. It says *he may act alone*.

This right is personal to the husband and is based upon the supposition that the dotal property is under his administration, 9 A. 12.

Because the law has provided that the husband may proceed in his own name to recover debts due his wife, does that prohibit him from permitting or authorizing his wife to sue therefor, as in this case, in her own name? We think not. The law has not rendered the wife absolutely incapable of suing, with her husband's authorization for her dotal property. On the contrary it expressly declares that actions relative to the ownership of dotal or paraphernal property or of some real right must be brought in the wife's name. C. P. 107.

The defendants however, contend that under the general rule a married woman cannot sue or be sued, and that where she brings an action she must show by proper averments that she is within the exception to the rule. They rely upon the case of Mrs. Jane Cowand, wife of Akin v. Mrs. Josephine Pulley, widow of Cowand. 9 A. 12.

That case is not analagous to the one we are now considering. In that case the wife sued without the authorization of her husband on a

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note which accrued during the existence of the community made in her favor by her husband and his partner, the husband of the defendant. The defendant in that case excepted on the ground that plaintiff was a married woman and had averred no facts in her petition which in law authorize her to stand in judgment *without the aid of her husband*.

The note was *prima facie* a community asset, and the husband as head and master thereof refused to authorize his wife to sue. The exception was properly sustained.

Without the authorization of her husband the plaintiff in this suit could not properly appear as plaintiff.

The defendants have no interest in contesting the right of plaintiff to sue on the note unless they have some defense against the husband which they wish to set up, or unless the satisfaction of the suit instituted by plaintiff would not release them from any demands of the husband on account of the note.

They have not alleged they have a defense as against the husband, and we conclude they have none. The appearing of the husband to authorize the suit concludes him from any demands he might have against them on account of the note.

In the case of *Peyronx et al. v. Davis*, 17 L. 480, this court said, "the defendant must aver that he has a good defense against the real owner, otherwise, whether the plaintiff is the owner or not, is a fact which cannot avail him."

In the case of *Shaw et al. v. Thompson*, 3 N. S. 392, this court said, "the suit appears to have been brought by the persons having the legal interest in the instrument sued on. Whether they were the owners or not, was a matter with which the defendant had nothing to do, as the judgment here formed *res judicata* against any other who might hereafter have claimed an interest in it."

We conclude therefore that the peremptory exception to plaintiff's right to prosecute this suit is not well taken.

We have carefully considered the evidence adduced by the plaintiff to prove the interruption of prescription and consider the interruption fully established. The books of the defendants in which the credits on the note of \$30,000 were regularly entered for a series of years, the extension of the payment and the credits indorsed on the note by the agent of the defendants, the payment of the \$4000 by check on the Citizens' Bank on the thirteenth of April, 1864, the production of the check itself, corresponding with the books of defendants, all corroborate the evidence of the plaintiff and clearly establish the interruption of prescription. The interruption of prescription is fully established without the testimony of Barjoe.

The defendants raise in their brief other points which we deem it unnecessary to answer. They are not such as to require serious consideration.

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We will, however, observe in reply to the objection that the judgment appealed from does not conform to the eightieth article of the Constitution, which requires judges to adduce the reasons on which their judgment is founded, that we find the following declaration in the judgment: "After hearing the evidence and argument of counsel, and considering the law and the testimony adduced *and the reasons orally assigned*, it is ordered," etc. We deem this a sufficient compliance with the constitutional provision. 12 A. 410.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

NO. 2074.—CHARLES WIECK v. H. V. BABIN, ex sheriff, and others.

A seizure and sale of property under a writ of *fi. fa.* was made on twelve months' credit, for which a twelve months' bond was given with approved security. At the maturity of the bond a *fi. fa.* was issued thereon against the principal and surety and property seized and again sold on twelve months' credit, for which a second twelve months' bond was given with approved security. At the maturity of this second bond execution again issued against the principal and surety. Held—That the second bond was taken without any warrant or authority of law and could not therefore be enforced in the summary manner provided by law for the execution of twelve months' bonds. That execution on the second bond would be stayed by injunction.

A PPEAL from the Fifth Judicial District Court, parish of East Baton Rouge. Posey, J. T. P. Greves and Fuqua & Callihan for plaintiff and appellant. A. S. Herron and Favrot & Lamon for defendants and appellees.

HOWE, J. In 1861 the sheriff of the parish of East Baton Rouge, as tax collector, seized and sold certain property of G. W. Roberts for the purpose of making therefrom the amount of a State license. Laws of 1855, p. 514, § 55.

The sale was made on twelve months' credit, and the purchaser gave, as sureties, on a twelve months' bond, P. A. Kugler and Pliny D. Hardy.

On this twelve months' bond *fi. fa.* issued, and in May, 1866, certain real estate, the property of P. A. Kugler, one of the sureties, was seized and offered for sale for cash, but not bringing its appraised value, as required by the then existing law (Acts of 1866, p. 90), was offered on twelve months' credit. It was thus sold on the fourth August, 1866, and P. A. Kugler, the surety and owner, bid it in and gave a twelve months' bond, with plaintiff in this suit as surety.

In August, 1867, after the maturity of the last bond, a writ of *fi. fa.* was issued on it, and the sheriff seized property of the plaintiff, who thereupon sued out the injunction now before us. There was judgment for defendants, dissolving the injunction, and plaintiff has appealed.

We find no authority in law for the second sale on credit and the taking of the second bond.

If we concede on behalf of the defendants that the first bond was valid, it should have been executed by a sale for cash. C. P. 720, and

Charles Wieck v. H. V. Dabin, ex sheriff, and others.

act of seventh April, 1826, amending the same. The second section of the act of March 2, 1866, in force in August, 1866, if it apply, does not appear to have changed this rule further than to have required that, upon such sale, the property should be appraised, and realize in cash its appraised value.

Without expressing then, any opinion upon the validity of the second bond as an obligation to been forced *via ordinaria*, we think it clear that it cannot be collected in the summary manner in which the defendants endeavored to proceed. Such summary process requiring no order of a judge, and in this respect swifter even than executory proceedings upon a mortgage, ought to be considered as *stricti juris*, and permitted only where it is clear that the bond, which the obligors acknowledge to have the force of a final judgment, is one given in pursuance of law in proceedings authorized by law.

We have been referred by defendants to several cases in which it has been held by this court that the surety on a twelve months' bond cannot, while his principal retains the property, be heard to allege any irregularities in the sale. 2 La. 360; 9 R. 185; 12 R. 206; 7 An. 542. This rule is well settled, and might be invoked against an attempt to enjoin the first bond. But we apprehend that it cannot be applied to the second bond, now before us, given in proceedings not authorized by law.

For the reasons given, it is ordered and adjudged that the judgment appealed from be avoided and reversed. It is further ordered that the plaintiff have judgment against defendants perpetuating the injunction issued herein on the twenty-fourth August, 1867, with costs in both courts.

NO. 1482.—JAMES A. DOUGLASS v. S. C. MANNING.

A settlement of business transactions between parties by one giving his note for the balance due, will be conclusive where the proof in the record shows that no error occurred in the settlement.

A PPEAL from the Sixth District Court, of New Orleans. *Duplantier, J. Horner & Benedict*, for plaintiff and appellee. *McCay & Lusen-burg*, for defendant and appellant.

TALIAFERRO, J. The plaintiff sues on a promissory note for \$700. The defendant in his answer pleads a general denial. Afterwards in a supplemental answer he set up a reconventional demand founded upon claims against the plaintiff for a quantity of ballast and a large lot of implements used by stevedores in their business, which ballast and tools he alleged he left in charge of the plaintiff in the early part of 1861, when, it seems, the defendant left the city and took up his

James A. Douglass v. S. C. Manning.

residence at Arcola and other places near the Jackson railroad. He avers that upon his return to the city in 1865, the plaintiff refused and failed to deliver to him certain tools, which he enumerates in detail, and that plaintiff had sold eleven hundred and fifty tons of the ballast entrusted to him without accounting to him for the proceeds, which he fixes at the sum of six thousand nine hundred dollars. He alleges that the note sued upon was given through error and without consideration. He prayed a trial by jury and judgment in reconvention for \$7626, and interest, &c. Upon affidavit made the court ordered a trial by jury, to which plaintiff objected, and the objection being overruled, a bill of exceptions was reserved.

The verdict of the jury was in favor of the plaintiff for the amount of the note, rejecting all claims on the reconventional demand.

The court thereupon rendered judgment in conformity with the prayer of petition and the defendant has appealed.

The plaintiff asks of us an amendment of the judgment allowing interest from twenty-fifth of September, 1865.

We do not find it necessary in the decision of this case to examine the bill of exceptions.

It seems that the defendant followed, previous to the late war, the occupation of a stevedore in New Orleans, and that the plaintiff was for a considerable length of time his chief clerk. About the beginning of the war the defendant left the city and remained away until the restoration of peace. He left in charge of the plaintiff implements of various kinds used in his line of business and a quantity of ballast. The plaintiff sold a part of this ballast, in lots, to different purchasers; a part was stolen, and a part taken by the military authorities. He appropriated a portion of the proceeds by the instructions of the defendant to the discharge of one of his debts amounting to \$340 70, and doubtless accounted for the remainder in the settlement that took place between the parties, when the balance due the plaintiff, after the adjustment of all claims between them, was fixed at \$700 and for which the defendant executed the note sued upon. A careful examination of the evidence convinces us that the verdict of the jury is fully sustained thereby.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

J. G. Rosenfield v. The Adams Express Company.

No. 1468.—J. G. ROSENFELD v. THE ADAMS EXPRESS COMPANY.

An application by defendant to remove a cause is analogous to a plea to the jurisdiction, and when ordered by the court the party against whom it is taken may appeal, but when the order of removal is refused, no irreparable injury follows, and it is unappealable. It will, however, be examined on the appeal taken by defendant from a final judgment on the merits, and if found erroneous, will be corrected.

The Adams' Express Company, domiciliated in the State of New York, and all of its corporators citizens of other States than Louisiana, has a right, when sued in one of the courts of this State, by a citizen of the State, to remove the cause to the next Circuit Court of the United States. Judiciary Act of 1789, Section 12.

All proceedings taken in a cause by a State court after erroneously denying an application to remove to the Circuit Court of the United States, are *coram non judice* and void.

Where the authority of an attorney at law to appear in a cause is not questioned it will be presumed, and his acts will be binding on the party for whom he appears.

A PPEAL from the Third District Court, of New Orleans. *Fellows, J. C. Roselius and Alfred Philips*, for plaintiff and appellee. *Sullivan, Billings & Hughes*, for defendants and appellants.

HOWE, J. The plaintiff brought this suit against the defendants, as express forwarders, and caused them to be cited through Alfred Lockwood. The defendants, appearing by their attorneys at law, filed a petition for the removal of the cause for trial into the next Circuit Court of the United States to be held in the Eastern District of Louisiana, offering surety in such amount as the court might require, and took a rule to show cause why the case should not be thus removed. The petition was verified by Asa S. Blake, who states in his affidavit that he is superintendent of the Adams Express Company. It appears from the record that upon the trial of the rule "the plaintiff objected to the transfer on the ground that the application was not in proper form, in this, that the authority of Blake, as superintendent of the company, does not extend to the power of representing the defendants in actions brought against them." Upon the ground that no such authority had been delegated to Blake, the District Judge denied the application. The defendants, reserving their rights upon this point, proceeded to answer upon the merits, and upon the trial a judgment was rendered against them, from which they have appealed.

The question which we meet at the threshold of the case is whether the District Court erred in refusing the application for removal. It is urged by plaintiff that as no appeal was taken from the judgment on the rule, the question cannot now be considered. The current of decision however, runs in a contrary direction. An application to remove is analogous to a plea to the jurisdiction, and when a removal is ordered the plaintiff would be without remedy against such an order, unless by appeal. It is otherwise when the court retains jurisdiction; the order is then an interlocutory decree, causing no irreparable injury and unappealable, but which may be examined on an appeal by defendant from the final judgment, and may then, if erroneous, be corrected. *Higgins v. McMicken*, 6 N. S. 712; 2 M. 176; 5 La. 378; 9 A. 241.

Proceeding then to examine the action of the District Court in this matter, we are constrained to the conclusion that it was erroneous. The defendants, averring themselves to be a corporation created by and under the laws of the State of New York, and that all its corporators are citizens of other States than Louisiana, had a right when sued in one of our courts by a citizen of this State, to remove the cause into the next Circuit Court of the United States, under the twelfth section of the Judiciary Act of 1789. 1 U. S. Statutes 79.

This right is established under the constitutional provisions respecting the judicial power of the United States, and the proceedings of a State court after erroneously denying it, are *coram non judice* and nugatory. *Gordon v. Lengest*, 16 Peters 97; *Kanonse v. Martin*, 15 Howard 198.

The law prescribes only the presentation of a petition by defendant on his first appearance, setting forth to the satisfaction of the court the necessary facts, and the offering of surety for the filing of copies of process in the next Circuit Court. It is the usual and approved practice to have this petition verified by an affidavit; but we are not aware of any rule which would make the affidavit of Blake in this case unauthorized or unavailing. The plaintiff did not attempt to show that the petition was in any respect untrue; indeed, it seems to be settled that such an attempt cannot be permitted. 7 La. 394; 14 La. 515; 6 Rob. 33. The court does not seem to have questioned the truth of the petition and no objection was made to the bond. The decision of the court appears to have been based upon the authority of *Fuselier v. Robin*, 4 An. '61, but that was a case where one attempted to obtain judgment against an absentee by citing an agent who had no special authority to receive citation, and it was correctly decided that the judgment must fall for want of a foundation. But in this case there is no question of sufficient citation. The plaintiff's petition does not aver agency in any one; a copy, with citation, was served on Lockwood, the only evidence of whose agency is found in the statement by the sheriff in his return that he knew him to be such lawful agent "by interrogating him." The defendants then appeared by their attorneys at law, members of our bar, whose authority is not questioned and will be presumed. 8 N. S. 234; 16 La. 368. Upon that for the first time appearing they make a showing which would seem to have entitled them to the removal of the cause to the Federal court.

For the reasons given it is ordered and adjudged that the judgment appealed from be avoided and reversed, and the case remanded to the District Court, with directions to accept sufficient surety for the removal of the cause to the next Circuit Court of the United States for the District of Louisiana, and thereafter to proceed no further in the case. It is further ordered that the appellee pay the costs of the appeal.

Michael Duncan v. George Arnold Holt & Co.

No. 1479.—MICHAEL DUNCAN v. GEORGE ARNOLD HOLT & Co.

21	235
110	553

Failure to except to the jurisdiction will not render valid a judgment by a court without jurisdiction *ratione materiae*.

A party, in whose favor a judgment has been rendered by a court having no jurisdiction, need not be made a party to the appeal.

Where a lot of cotton is sold by weight, delivery does not take place until the cotton is weighed. The sale is incomplete until actual delivery has taken place. The fact that the vendor subsequently sold and delivered the cotton to another party is incompatible with delivery to the first vendee.

APPEAL from the Second District Court of New Orleans. *Thomas, J. Randolph, Singleton & Hardie*, for plaintiff and appellant. *Campbell, Spofford & Campbell*, for defendants and appellees.

WYLY, J. Plaintiff sued the succession of George Arnold Holt and T. J. O'Regan, the surviving partner of the commercial firm of George Arnold Holt & Co., *in solido*, for the amount claimed by him in the Second District Court of New Orleans.

Both defendants appeared and pleaded to the merits, and there was judgment in their favor.

Plaintiff appealed.

Appellees move to dismiss this appeal because T. J. O'Regan, one of the defendants, has not been cited nor in any manner made party to the appeal.

Appellant contends that it was unnecessary to make O'Regan a party to the appeal because the judgment against him is a mere nullity, the Second District Court of New Orleans not having any jurisdiction as to him.

It is well settled that all parties interested in maintaining the judgment must be made parties to the appeal or it will be dismissed. 12 R. 203; 11 A. 409; 12 A. 775.

Is T. J. O'Regan interested in maintaining the judgment of a court that had no jurisdiction of the case *ratione materiae*?

We think not. His failure to except to the jurisdiction of the Probate Court did not render valid the judgment as to him, which that court had not jurisdiction to decree.

The judgment as to O'Regan was a mere nullity, the Second District Court of New Orleans having only probate jurisdiction.

The motion to dismiss is therefore overruled.

ON THE MERITS.

Plaintiff alleges that he sold to the defendants on third February, 1866, one hundred and forty-five bales of cotton weighing fifty-three thousand and twenty-two pounds, at forty-eight cents per pound, "that on the fifth February, 1866, the defendant's broker caused said cotton to be turned out, sampled, classed, marked and transferred upon the books of the cotton press into the name of said defendants; and the said cotton was about being weighed by the weigher acting for the plaintiff when the weigher acting for the defendants forbid the weighing of said cotton;" the next day the brokers of the defendants notified

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the plaintiff that the purchasers refused to receive the cotton; some correspondence ensued between the vendor and vendees, and the latter refused to accept the delivery and pay for the cotton because, as they aver, it was found to be damaged and in unmerchantable order.

Plaintiff avers that he subsequently placed the cotton again upon the market and caused it to be sold as soon as it could be done without injury by a prudent and skillful broker, who obtained therefor forty-four cents per pound, the highest market price, cotton having declined several cents per pound in the meantime.

He now sues the defendants to recover the difference in price between the amount received by him for the cotton at the last sale and the amount agreed upon in the negotiation with defendants.

The defendants denied generally the allegations of plaintiff, and averred they were not liable for the difference in the price of the cotton as claimed; that they never received the delivery of the cotton they had negotiated to buy; that they had a good reason to refuse to accept the delivery of said cotton "on account of the wet, pulpy, and unmerchantable condition of the bales at the moment plaintiff sought to impose said cotton on them, which they then, for the first time, discovered."

There was judgment in favor of the defendants, and plaintiff has appealed.

The plaintiff in his brief insists that the "cotton was by the purchaser's classer classed, marked, received and transferred on the black book of the cotton press from the plaintiff to the purchasers; and that this constituted a sale." The evidence satisfies us that the sale to the defendants was never perfected by the weighing and delivery of the cotton. It would be strange for the cotton to be transferred and delivered to the defendants and yet plaintiff be able to retain possession of the cotton and sell it to other parties which he did in a few days after the alleged sale.

The letters of plaintiff and the defendants, their correspondence in reference to the sale, made part of plaintiff's petition, show that the sale had not been consummated by delivery of the cotton. In plaintiff's letter of sixth of February, 1866, he says to the defendants: "If you persist in your refusal already made to receive said cotton and pay for the same I shall sell the same for your account and shall hold you responsible for whatever damages I may sustain in consequence of said refusal."

Upon the samples, and without seeing it, the defendants negotiated to buy the cotton at forty-eight cents per pound. It was never weighed and legally delivered to them. Article 2433 of the Civil Code declares that: "When goods, produce or other objects, are not sold in lump, but by weight, by tale, or measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery of them or damages, if any be for the same, in case of non-execution of the contract."

Having sold the cotton by samples to the defendants, it was the duty of the plaintiff to tender to them the delivery of the bales corresponding with the samples in quality, and in good merchantable condition. Without doing so he could not complain if the defendants refused to accept the delivery and to comply with the terms of the contract.

The evidence in the record is somewhat conflicting, but it fully establishes the fact that the bales were in bad order and in an unmerchantable condition. The witness Borrin, a licensed cotton weigher of the city of New Orleans for the last fourteen years, employed by the defendants to examine the cotton and see whether it was free from country damage, false packing and to attend to the weighing, declares that on a particular examination of the lot, say eighty or ninety bales, "I found a considerable number of damaged and unmerchantable bales. The nature of said damage being a layer or wrapper, enveloping nearly the whole bale, and under the bagging of dry rotten cotton, highly discolored from long previous exposure to wet, the same influence which had destroyed the staple. The bagging and rope on these bales were rotten so as to be easily sundered by the hand." The same witness again testifies, "I made two examinations; on the first I refused to take it and so reported. I then returned in company with Mr. Duncan, the vendor, and made a second and more particular examination. I was about three-quarters of an hour or an hour examining it on the first occasion. The second required much longer time. I also gave it a third examination in company with Mr. Henry Miller, an experienced cotton classifier, and John H. Smith, also a classifier and receiver of cotton."

The witness Smith says: "I was called as a third party, and I examined the cotton in question; thirty-six bales in the press room of Fassman's press found damaged and gone to pulp on the outside; nineteen bales on the opposite corner of the yard were damaged, but I would have taken them on a proper allowance. I then called on the yard clerk to show me the balance of the cotton. * * * He informed me it was no use; it was pretty much all the same. I reported accordingly to Mr. George Arnold Holt, and of course the cotton was rejected as unmerchantable. I have been an expert in cotton the last twenty years. Taking the lot as a lot it was not in a merchantable condition." The witness Campbell who received and weighed the cotton for O. B. Graham & Co., who afterwards purchased it, says: "I examined it thoroughly, looking at every bale and having my men to tear off the bagging. The condition was very bad. It was all in bad condition except a few bales."

From the evidence we conclude that the cotton was not throughout equal to the samples and in good merchantable bales. The tender of delivery of such bales, damaged and pulpy in the outer layer, and in bad order, was not such a tender as would subject the defendants to damages on failing to accept the delivery and to comply with the terms of the sale.

The plaintiff failed to put the cotton in good order, when objected to,

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and to tender the same for delivery to the defendants as merchantable bales, in every respect corresponding with the samples.

This was a pre-requisite before the seller could demand of the buyers to receive it and pay the price, or in default thereof become liable to him for damages.

We concur in the opinion of the court below who heard the delivery of the evidence by the witnesses, that the plaintiff has failed to make out such a case as entitles him to a judgment.

It is therefore ordered that the judgment against the plaintiff and in favor of the defendant, the succession of George Arnold Holt, be affirmed with costs.

Rehearing refused.

No. 1459.—JOHN B. ROTH v. MRS. M. A. HEBERT.

Prescription may be pleaded in the Supreme Court and when no application is made to have the case remanded to show an interruption, the plea will be maintained, if the documents declared upon are prescribed on their face.

A PPEAL from the Second District Court, parish of Plaquemines. *Cazabat, J. Sambola & Ducros*, for plaintiff and appellee. *E. H. McCaleb* for defendant and appellant.

HOWELL, J. The defendant has appealed from a judgment against her on three promissory notes, made by her on twenty-second January, 1859, due all in the month of March 1860, to the order of and endorsed by Mrs. Valery Hebert, and to the suit on which she pleaded the general denial. In this court she has filed the plea of prescription of five years.

Suit was instituted on the fifteenth October, 1866, and citation was served on fifteenth November following. No interruption of prescription appears, although the witnesses were interrogated as to a demand and promise of payment. Their answers show that the defendant has refused to pay the notes or acknowledge her obligation to do so. We consider that on the face of the notes and the record prescription has accrued, and as no application has been made to have the cause remanded to show an interruption, we must sustain the plea.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of the defendant with costs in both courts.

No. 2035—E. ADAMS, Tutrix, v. M. DERMODY, et als.

Where citation of appeal is not prayed for by the appellant, and none is issued to the appellee, the appeal will be dismissed.

A PPEAL from the Second District Court, parish of Jefferson. *Pardee, J. Cotton & Levy*, for plaintiff and appellant. *A. Cazabat and McGloin & Kleinpeter*, for defendants and appellees.

HOWELL, J. This is an appeal from a judgment dissolving an injunc-

E. Adams, Tutor. v. M. Dermody et als.

tion, sued out against the United States marshal and others, to enjoin a sale under a process from the United States Circuit Court in this city. A motion is made to dismiss the appeal (which was granted on a petition), on the ground that the movers and no one in interest have been cited as appellees, nor has any citation been asked for in the petition of appeal.

The motion is well taken. It may be considered as now settled in this court that when citation of appeal is not prayed for by the appellant, and none is issued, the provisions established by the act of 1839, and re-enacted in 1866, in favor of the appellant, are not applied to maintain the appeal, but the fault is attributable to the appellant, and the appeal dismissed. See the cases reported in 17 An. 74; 18 An. 626, 700, and authorities therein cited.

Appeal dismissed.

Rehearing refused.

No. 2142—ABAT et al. v. L. G. ATKINSON; P. B. BUNLEY et al. v. the same, and GOTTENGER, use of, &c. v. the same.

The paraphernal property of the wife cannot be seized for a debt due the community, growing out of improvements made upon her hereditary lands, until her indebtedness to the community is judicially established.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. Cross & Hardee*, for plaintiffs and appellants. *Musc & Pipkin* for defendants and appellees.

TALIAFERRO, J. In October, 1865, Adelia Atkinson, wife of the defendant, obtained against him a decree of separation of property, a dissolution of the community of acquets and gains, which she renounced, and a judgment for \$5000, with legal interest from judicial demand. About the same time, the plaintiffs alleging themselves to be judgment creditors of the defendant, severally issued executions under which they seized defendants' interest in the following property: "A certain tract of land upon which defendants, L. G. Atkinson, and his wife now reside, containing seven hundred and ten acres, and being the same land received by Adelia Boone, wife of said Atkinson, as a legacy from her father, John Boone, said land situated in the parishes of East Feliciana and East Baton Rouge; that interest consisting of the dwelling house, out houses, gin and all other buildings, and the increased value of clearing up, ditching and putting under fence two hundred and fifty acres of said land." They then caused a rule to be served upon Adelia Atkinson to show cause why the said land and improvements should not be sold together and the proceeds divided on a regular and double estimation in conformity with law. The wife, duly authorized, appeared and filed a motion to dismiss the rule, alleging several grounds of illegality in the plaintiffs' proceedings against her. This motion

Abat et al. v. L. G. Atkinson; P. B. Bunley et al. v. the same, and Gottenger, use of, &c., v. the same.

was afterwards withdrawn and an answer filed. The answer contains a general denial and the averment that there is no foundation for the claim plaintiffs set up in right of her husband, and if there were, she would be entitled to compensate it by the judgment she obtained against her husband. She denies any right in plaintiffs to proceed against her property upon the claim set up by them, before at least obtaining a judgment of a competent tribunal ascertaining and fixing her liability, if any, for improvements made upon her hereditary lands.

There was judgment rendered in favor of the wife, dismissing plaintiffs' suit, and they have appealed. To sustain the proceedings taken by them in this case the plaintiffs' invoke the authority of the case of *Dominguez v. Lee et al.*, 17 L. R. p. 295. We do not think the ruling in that case is favorable to the position they assume. In that case a judgment creditor of the husband seized a town lot, the paraphernal property of the wife, upon which there was a building when she acquired the lot as separate property. Subsequently and during marriage, other buildings of greater value, were erected upon the lot. The main question in the case was, whether the improvements made on the wife's lot, with funds proceeding from a loan obtained by mortgaging her property, belong to the owner of the soil who put in jeopardy the loss of the lot itself, for the advantage of its amelioration, or to the community. Not being shown that the funds with which the improvements were made were the separate funds of the wife, the court determined that they belonged to the community, and rendered them liable for the husband's debt. But the injunction taken out by the wife to prevent the sale of her property, was perpetuated as to the lot, which was forbidden to be sold; "the double estimate" spoken of, relating only to the buildings, one of which was the separate property of the wife, and the others, under the decision of the court, belonged to the community. In the case now under consideration the plaintiffs' claim that the wife having renounced the community, all the improvements and ameliorations made upon the tract of land, the paraphernal property of the wife, belong to the husband and are liable to seizure for his debts; and that the improvements cannot, without waste, be sold separately from the lands. As to the correctness of these views in general, we are not required to express any opinion; but we should hesitate to sanction the seizure of the wife's separate property before her liability for a debt, if there be one due to the community, is, by judicial action, clearly established. This the plaintiffs have failed to have done. The testimony introduced on the trial determines nothing bearing directly upon the important point in the controversy, the enhanced value of the hereditary land of the wife by means of the improvements made upon it during the marriage. The testimony is rambling and indefinite. Two witnesses speak as to the present value of the property, the land with all its improvements as they now exist. One of them fixes the value at five dollars per acre and the other at seven dollars per acre. One witness says unimproved lands in the neighborhood, at present, are

Abel et al. v. L. G. Atkinson; P. B. Bunley et al. v. the same, and Gottenger, use of, &c., v. the same.

worth not more than two dollars and a half per acre—another witness was unable to sell unimproved lands in the neighborhood at two dollars per acre.

We find no error in the disposition made of the case by the lower court.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs. 2 An. p. 43; 6 An. p. 634; 6 Rob. 513; 8 Rob. p. 188.

Mr. Justice Howell took no part in this decision.

No. 2132—J. D. SMITH v. HIS CREDITORS.

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47 1406

The tacit mortgage of the heirs of their deceased mother on the property of their father, for the restitution of the paraphernal property, or funds which he has received, only attaches on the property of the father from and after the date at which he becomes the owner of the property.

The mortgage, resulting from a judgment against the husband and his brother *in solido*, rendered and recorded before the sale of the property from the brother to the husband, will take precedence of the tacit mortgage against the property of the husband in favor of the heirs for the restitution of the paraphernal funds of their mother deceased. Such preference of mortgage rights may be enforced against the proceeds where the property has been sold.

A written act of sale of real estate has no effect against third parties until it is recorded in the proper office, unless it is shown that the party affected by it had knowledge of its existence and contents.

APPEAL from the District Court, parish of West Feliciana. *Miller, J. W. D. Winter*, for plaintiff and appellant. *Collins & Leake and Race, Foster & E. T. Merrick*, for opponent and appellee.

HOWELL, J. The syndic herein filed an account of his administration, by which, after allowing certain charges, he proposed to distribute the balance of the funds in his hands among the heirs of Mrs. Mary C. Smith, wife of the insolvent, on account of their claim for paraphernal funds received by the insolvent during the marriage and secured by legal mortgage. He also set down the said heirs as creditors with tacit mortgage in the sum of ten thousand dollars, for half the value of cotton on hand at the death of their mother and sold by the father.

Alfred Penn, as a creditor, with a judgment duly recorded against Gordon A. and Joseph D. Smith, *in solido*, opposed the account on the grounds, among others, that his claim is omitted; that the claim of the heirs of Mrs. Smith to the funds to be distributed, and that for ten thousand dollars, are not legal charges against the insolvency, and if they exist, are ordinary claims; and that his mortgage upon the property sold is superior to the title of J. D. Smith, the insolvent, who acquired it after the death of his wife.

The facts necessary to the inquiry are the following :

In 1845 the Bank of Louisiana caused a plantation, called "Solitude,"

and the slaves thereon, to be sold as the property of J. D. Smith, and became the purchaser thereof.

In 1846 the bank sold the same property to Gordon A. Smith, a brother of said J. D. Smith, and took a mortgage to secure the amount of the bond given in payment of the price. Ten days thereafter, Gordon A. Smith executed this instrument:

ST. FRANCISVILLE, May 18, 1846.

Having purchased of the Bank of Louisiana a certain tract of land, known as the Solitude plantation, and the slaves thereon, mentioned in said sale, mortgaged to the Bank by Joseph D. and Luther L. Smith, I, Gordon A. Smith, do agree and obligate myself, my heirs and assigns, when the amount of my bond for the sum of \$11,779 97, shall have been satisfied, with the interest, to the Bank of Louisiana, by Joseph D. Smith and his wife Mary Cora Smith, to transfer and make good to them the titles to said property, they to remain in possession of the same, to guard and repair as for their own use and benefit, said property.

(Signed)

GORDON A. SMITH.

In 1858 this same property was seized under a *fi. fa.* issued in the case of the "Union Bank of Louisiana v. Joseph D. Smith, Luther L. Smith and Ann E. Smith," when Gordon A. Smith, *as owner thereof*, enjoined the sale. A compromise was effected, by which Gordon A. Smith and Joseph D. Smith gave the Union Bank their joint and several notes amounting to five thousand dollars, which became the property of Penn, the opponent, who obtained judgment on three of them in 1865, against G. A. and J. D. Smith, *in solido*, which was recorded on seventh December, 1865.

In June, 1863, Mrs. Mary C. Smith died, leaving nine children, the eldest being then married and of age.

On seventeenth May, 1866, Gordon A. Smith, by authentic act, sold the Solitude plantation to J. D. Smith, nominally for five thousand dollars cash, but shown, by the testimony of the two, to have been in consideration of the payment by J. D. Smith, prior to January, 1860, to the Bank of Louisiana, of the amount of G. A. Smith's bond, in compliance with the above document of eighteenth May, 1846.

On twenty-third May, 1866, six days after the above transfer, the succession of Mrs. Smith was opened and the father was confirmed in the tutorship of seven of the children. In the inventory, the "Solitude" plantation was included as community property, and the paraphernal claims, allowed by the syndic, were described. Counsel for the opponent admit in their brief that funds of the wife amounting to six thousand dollars, were received by the husband in 1857 or 1858.

On thirty-first January, 1867, J. D. Smith made a cession of his property to his creditors, placing on his schedule said plantation as community property, the proceeds of which are now in controversy between Penn and the heirs,

It is clear that the judicial mortgage in favor of Penn, the opponent, attached to said property on the seventh December, 1865, whether it belonged to Gordon A. Smith or Joseph D. Smith, for his judgment was against both, *in solido*, and was recorded on that day; and the question is, had the mortgage set up by the heirs previously attached? If so, it is because the property belonged to J. D. Smith before Penn's judgment was recorded.

The *legal* title to the property existed in Gordon A. Smith, until he transferred it on the seventeenth May, 1866, but it is contended that the property actually belonging to Joseph D. Smith by virtue of the instrument of eighteenth May, 1846, the payment made by him in accordance therewith prior to the year 1860, and his constant possession up to the sale in these proceedings. This document, however, was never recorded, and whatever may have been its effect as between the parties, it had none as to Penn, until it was adduced on the trial of his opposition herein—unless he had knowledge of it before, which is not shown. It is urged that his attorneys were aware of the actual ownership in J. D. Smith, because they were the attorneys of the Union Bank in 1858, when its seizure was enjoined and the compromise was made, and also were the attorneys of the insolvent in opening the succession in May, 1866, when under their advice or superintendence, the "Solitude" plantation was inventoried as community property.

The knowledge, presumed from the injunction against the Union Bank, is adverse to any ownership in J. D. Smith at that time; for the injunction was successful in leaving the ownership claimed and sworn to by Gordon A. Smith, undisturbed and recognized. At the date of opening the succession of Mrs. Smith, the transfer had been made to J. D. Smith, and the act of inventorying it as community property does not imply a knowledge in the attorneys that it had belonged to J. D. Smith by virtue of the written instrument in question.

In no other mode is knowledge imputed to the opponent, and we are not prepared to charge him with any such knowledge upon the evidence in the record, which, on the contrary, shows the title to have been in Gordon A. Smith from the eighth May, 1846 to the *seventeenth May*, 1866—over twenty years—during which time his creditors could have made it liable for their claims against him. 6 A. 809; 16 A. 436. The claim of the opponent had its origin, as to him, in 1858, and passed into the form of a judgment with mortgage against him *on seventh December*, 1865, and the property went into the hands or ownership of J. D. Smith incumbered with said mortgage, and then became also subject to the mortgage as against the purchaser, J. D. Smith, by virtue of the same judgment. C. C. Arts. 3289 and 3296. This case is not parallel to that of *Peters v. Toby*, 10 A. 410.

Our conclusion is, that the mortgage of the opponent is superior to any in favor of the heirs of Mrs. Smith, deceased wife of the insolvent,

and that, under the circumstances, this mortgage can be enforced against the proceeds in the hands of the syndic. They are the proceeds of the property subject to opponent's mortgage, which he can follow, and there is no proof that the mortgagor has other property. C. C. 3362; C. P. 301, 402, 403; 7 A. 344. Such a proceeding avoids a circuitry of action.

As the judgment of the District Court simply denies the right of the heirs to the fund derived from the sale of the plantation, distributed in the account now before the court, and cannot affect their claims against any fund to be hereafter distributed, or against their father, we deem it unnecessary to disturb said judgment; nor do we think it essential to pass on the bills of exception in the record.

Judgment affirmed.

21 244
113 858

No. 2087.—CITY OF BATON ROUGE v. T. J. BIRD, SHERIFF, et al.

In the dedication of lands for the public use, no particular form need be observed; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation.

Where a dedication to public use of lands in squares, designated by metes and bounds is shown, and private individuals acquire the lands adjoining and surrounding it, with reference to the boundaries thereof, the lands so dedicated for the public use are out of commerce, and are not subject to individual or private ownership.

A PPEAL from the Fifth District Court, parish of East Baton Rouge. *Posey, J. Burgess, Fuqua & Callahan*, for plaintiff and appellant, *A. M. Dunn and C. D. Favrot, Andrew S. Herron and Barrow & Pope*, for defendants and appellees.

LUDELING, C. J. In January, 1867, the plaintiff obtained an injunction to restrain the Sheriff from selling two squares of land situated in the city of Baton Rouge, designated in the pleadings as "Mexico Square" and "Government Landing." The petitioner alleges that the property belongs to the city of Baton Rouge, and that it has been in the possession of the city for more than twenty years without interruption. The petitioner then recites that the heirs of Elie Beauregard having instituted proceedings for a partition of the property, obtained an order to sell these squares for that purpose. The plaintiff denies that said heirs have any right, title or claim to the property, and prays that the city of Baton Rouge may be declared the owner of the two squares of ground, and be quieted in its possession thereof.

The defendants deny all the allegations contained in the petition, and especially that the city of Baton Rouge has any title to the property in its own right; they aver that if the city has any title, it is for the benefit of and interest for them. They allege that they are the true and lawful owners of the property, the sale whereof has been enjoined, and they pray that judgment may be rendered quieting them in their title and possession, and dissolving the injunction with damages.

The nature of the titles under which the parties respectively claim, is not stated in the pleadings.

From the evidence and the brief in this case, it appears that the claim of the city of Baton Rouge to the property in question is founded on a dedication of these squares to public use, by Elie Beauregard, the ancestor of the defendants, who now claim to be the owners of the two squares.

In the beginning of this century Elie Beauregard was in possession of a plantation adjoining the post of Baton Rouge, on which now stands the principal part of the city of Baton Rouge. He laid off a part of this tract into lots, streets and squares; he prepared a plan of the proposed city, and he published a notice of his intentions and plan.

This must have been done anterior to the acquisition of Louisiana by the United States, as the map contains sites (emplacements) for the location of "Government Palace," "Intendance," and "King's Store."

The map in evidence is admitted to be correct, and in exact accordance with the plan described in Beauregard's advertisement. This map, as well as the advertisement of the plan of the city, clearly shows that the squares in question were intended to be dedicated to public use.

On the map a space is designated as "Plaza de Mexico," and another space, fronting on the river, is designated as "Plaza de Colomb." In his advertisement Elie Beauregard says: "*J'ajouterai seulement quelques explications relatif au plan actuel.*" * * * "*Il y a sept places publique de differentes dimensions.*" Of Plaza de Mexico and Plaza des Florides he says: "*Ces deux places, qui pourraient être, par la suite, ornées d'une fontaine dans leur milieu, auront 230 pieds de large sur 310 de longueur, et communiqueront à la Grande Place par des rues de traverse.*"

Cousinard testified that he had known Mexico Square about thirty-eight or forty years—that it had never been held as private property, and was always considered as belonging to the city of Baton Rouge during that time. Government Landing, or Plaza de Colomb, is at the foot of Government street.

J. E. Elam testifies that he has known Mexico Square and Government Landing about twenty-five years; that neither of these places had ever been claimed or occupied as private property during that time. They were always considered and treated as public places. In 1865 Mexico Square was surveyed at the instance of the city; streets were laid off, and trees were planted on the square. What is now known as Government Landing is designated as Plaza de Colomb on the plan of the city, and the tradition relating to it is that it was intended as a public landing.

Has there been a dedication of the two squares to public use?

"There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the

owner of the land, and the fact of its being used for the public purposes intended by the appropriation." 6 Peters 440; 3 An. 282.

In this case an actual dedication has been proved.

The consent of the owner is contained in the publication of his plan of the city, made at least as early as 1803, in which he says:

"*Il y a sept places publiques de differentes dimensions.*" * * *

"*Il y a aussi plusieurs autres emplacement destinés pour des établissements publics, tels que Palais du Gouvernement, Maison de Ville, Intendance,*" etc.

The map of the city represents the two squares as *public places*; the spaces occupied by them are not divided into lots, and a name is given to each square—Plaza de Mexico and Plaza de Colomb.

In the case of *Beatty v. Kurts*, 2 Peters 566, the Court held that there was a dedication to public use when a lot of ground had been marked out upon the original plan of an addition to Georgetown, "for the Lutheran Church," and had been used as a place of burial from the time of dedication. In the case of the city of Cincinnati *v. White's lessee*, 6 Peters 182, the Court held that where a plan was made and approved by all the proprietors, by which a space was set apart as a common for the use and benefit of the town, and no lots were laid out on the land so designated, it was dedicated to public use. The evidence in the record shows that the property in question has always been regarded as public places; that they have never been assessed as private property, and that they have been left unoccupied and open as commons for the use of the public from the date of the dedication till 1865, when trees were planted in the Plaza de Mexico.

Lots were bought and sold with reference to the plan of the founder of the city. After being thus set apart for public use and enjoyed as such for more than half a century, and private rights had been acquired with reference to it, the original owner or his heirs cannot be permitted to deny or revoke such dedication.

To do so would be a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted, as was well said in the case of the city of Cincinnati *v. White's lessee*. Referring to the system of law under which this case was decided, Judge Martin said: "I have looked in vain, in the opinion of the court, for a reference or allusion to any principle peculiar to the common law of England. It has appeared to me that the case was determined on the first broad and general principles of law mentioned in the *Corpus juris civilis*, viz: *Honeste vivere*, to act honestly, from which is deduced the maxim of *polliciti servare fidem*, when we have made a promise to keep it; and the necessary corollary, *turpe est fidem fallere*, it is shameful to disappoint expectations we have authorized." 5 La. 170 and 219.

We are authorized, therefore, in holding that there was a dedication

City of Baton Rouge v. T. J. Bird, Sheriff, et al.

to public use of the two squares in question, and that they are "*hors de commerce*."

In the brief filed for the defendants, it is said "one of two things was intended by Beauregard—either that *he* intended to erect the necessary buildings, and to lay off and beautify the grounds himself, or the city was to do it. In the first place it would not be a dedication, and in the second the city would have to do the work intended before it could be invested with title." This is an error of fact. As has already been stated, Beauregard dedicated certain squares to public use—he designated them, in his advertisement, "*places publique*," and on the map, "*plazas*." There were other *sites* (emplacements) for public buildings, which he designated in his plan, and which he expressly stated were to revert to him after the lapse of ten years, unless the buildings were erected within that period.

But the squares in question are not included among the *sites* (emplacements) which were to revert to him, for no buildings of any kind were to be put upon them; on the contrary they were to be open squares—"plazas," "*places publique*."

The facts in this case are different from those in the cases in 5 An. p. 8, 16 La. p. 705, and 14 An. 872. In these cases there was "no evidence of dedication out of the plan (map), and none in the plan out of the word Coliseum," etc. The court held that a Coliseum, market and church may be private property, and that merely writing these words across a square on a plan of a town was not proof of the intention of the owner to dedicate them to public uses. But in this case there cannot be room to doubt what Beauregard's intention was—his language, corroborated by the map in evidence, is unmistakable.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of the city of Baton Rouge, quieting it in its title and possession to Mexico Square and the Plaza de Colomb, and perpetuating the injunction issued in this case.

It is further ordered that the defendants pay the costs of both courts.

No. 1460.—THEODORA THERESA PERRY v. MARGARITTA WEBB.

The right of expropriating a right of way over a neighbor's property cannot be allowed, except in cases of extreme necessity, and where a party can make a road or passage over his own lots to the public streets, he must be required to do so. C. C. 695.

APPEAL from Second District Court of New Orleans, *Thomas, J. Collens & Wooldridge*, for plaintiff and appellant, *J. M. Dirrhammer*, for defendant and appellee.

WYLY, J. Plaintiff sues for a passage from her property over defendants property to Washington avenue.

The defense is a general denial and the prescription of ten years.

There was judgment for defendant and plaintiff has appealed.

Theodora Theresa Perry v. Margaritta Webb.

In 1852 the husband of the plaintiff acquired a lot of ground in a square that was surrounded by other lots then vacant, and for a time passed over the lots owned by the defendant. Subsequently this passage was closed; and in 1861 the plaintiff bought from William Lange the lots contiguous to her own, fronting on Music street.

Ever since said purchase plaintiff has had access to her property by passing over her own lots.

The value of the property would be the same, according to the evidence, whether it had a passage over plaintiff's own property to Music street or over the defendant's property to Washington Avenue. It is certain that the plaintiff has for many years been using the passage over her own property, and has not apparently suffered any detriment by the closing of the passage over the defendant's property.

This case is analagous to that of *Pousson v. Perché*, 6 A. 119, in which it was held that, "the right of passing over the defendant's property is the forced expropriation of a participation in what belongs to her. This should never be done except in cases of extreme necessity." Article 695 of the Civil Code gives the proprietor, whose estate is enclosed, and who has no way to the public road, a right to demand a passage over the estate of his neighbor.

We cannot perceive any right of the plaintiff to set up such a demand, she having already access to her property over her own lots on Music street.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

NO. 2141.—LIQUIDATOR OF CLINTON AND PORT HUDSON RAILROAD COMPANY v. B. M. G. BROWN AND WIFE, and DELIA HAYNES v. THE SHERIFF AND OTHERS.

(Consolidated cases.)

The fact that certain of the Clinton and Port Hudson Railroad bonds were kept in the same safe where the liquidator of the company kept its papers, books and assets did not operate a payment of the bonds nor an extinction of the mortgage.

Where the Sheriff held an execution issued in favor of the company directing the sale of the mortgaged property, nothing short of a payment into the Sheriff's hands would operate as a payment or satisfy the mortgage.

A PPEAL from the Fifth District Court, parish of East Feliciana. *Posey, J. S. E. Hunter*, for plaintiff and appellee, *Cross & Hardee, Race, Foster & E. T. Merrick*, for defendants and appellants.

WYLY, J. The New Orleans Gaslight Company recovered judgment against the Clinton and Port Hudson Railroad Company for a large amount, and ordering the liquidator of said company (an insolvent corporation) to proceed to collect from the mortgage stockholders the amount due by them, to be applied to the payment of the claims of the Gaslight Company.

The liquidator, Charles McVea, accordingly sued out an order of

Liquidator of Clinton and Port Hudson Railroad Company v. B. M. G. Brown and Wife, and Delia Haynes v. The Sheriff and others.

seizure and sale against certain lands near Clinton, Louisiana, which B. M. G. Brown and wife mortgaged to the Clinton and Port Hudson Railroad Company on the seventh of November, 1835, to secure his subscription of sixty-two shares of stock amounting to \$6200.

Mrs. Delia Haynes, the owner of two hundred and seventy-two acres of the land, enjoined the sale. She acquired the land from her husband, Bythell Haynes, in settlement of his indebtedness to her for paraphernal funds, it having been purchased by him from the original mortgagor, B. M. G. Brown.

She alleges that the debt for which the land was seized is due by Brown; she verily believes it has already been paid and that the seizure and sale is for the benefit of Brown. That said debt was paid in the following manner, to wit: "The Gaslight Company, the real plaintiffs, sold to said Brown bonds and coupons sufficient to pay said debt, that said bonds were sold on the express condition that they were to be applied to the payment of this debt; and that as to plaintiff and defendant, said mortgage debt for which this seizure is made is actually settled. That said Brown being bound by law to pay said mortgage debt and having virtually paid it as herein set forth, cannot through the agency of his creditor thus seize and sell said tract of land sold by him to said Bythell Haynes, under whom petitioner holds with subrogation of all the rights of her husband."

Her petition concludes with a prayer for a writ of injunction for damages, and "that it be decreed that said mortgage debt is fully paid by the bonds in the hands of said Brown or McVea, sold by the Gaslight Company to him expressly to pay said debt."

On the twenty-fourth of September, 1863, James R. Shelton purchased the land in question from Mrs. Delia Haynes, and on the fourth of June, 1867, he intervened in this suit; adopting the allegations of Mrs. Haynes he prayed that the injunction be sustained, that the claim of the liquidator be rejected, the mortgage be erased and he be decreed the owner of the land.

The court below rendered judgment in favor of the defendant, dissolving the injunction without damages, dismissing the intervenor at his costs, and ordering the sheriff to proceed and sell the property seized as directed by the writ.

The plaintiff Mrs. Delia Haynes, and the intervenor James R. Shelton have appealed.

The question to determine is, has the mortgage to the Clinton and Port Hudson Railroad Company been paid?

Appellants contend it has. They insist that the Gaslight Company are virtually the owners of the mortgage under which the land in question was seized; that the original mortgagor Brown, purchased from said company their bonds for \$6200, with the understanding that he was to use them in discharging the mortgage. They say this constitutes a payment.

We think the record does not sustain the assumption that the Gaslight Company are the owners or virtual owners of the mortgage.

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Della Haynes v. The Sheriff and others.

We understand their judgment against the Clinton and Port Hudson Railroad Company to be simply a recognition of their claims against the insolvent corporation and an order requiring the liquidator to collect forthwith the claims in his hands and apply the proceeds to the payment of their judgment.

The judgment of the Gaslight Company did not decree them to be the actual or virtual owners of the mortgages held by their debtor, the insolvent corporation; the order requiring the liquidator to make collections and pay the judgment, did not operate as a transfer of the assets of the corporation.

The purchase by Brown of \$6200 of the bonds and coupons of the Gaslight Company for \$1200 in cash, even though receivable at par in satisfaction of the mortgage, did not amount to a payment of the mortgage. Even though they were sold to Brown for the express purpose of paying off the execution, still there would be no payment till the intention be carried into effect and the funds delivered to the sheriff or the liquidator. It is true the Gaslight Company received from Brown the \$1200 in cash, but they delivered to him an equivalent, to wit: \$6200 in their bonds and coupons, the market value of which was doubtless equal to the \$1200. Until these bonds and coupons or the cash are paid over to the sheriff or liquidator, there can be no payment of the mortgage. The bonds and coupons of the Gaslight Company which they sold to Brown are still held by him. They have never been given to the liquidator in payment of the mortgage. The liquidator testifies he "never had absolute control over them so as to appropriate them to the payment of this debt."

It matters not where the bonds were kept, whether in the same safe or same portfolio that the liquidator kept the assets of the insolvent corporation, the bonds remained in possession of the attorney and agent of Brown—they were and are, in effect, in Brown's possession.

Bythell Haynes, the husband of the plaintiff, and to whose rights she is subrogated, was well aware of the existence of the mortgage on the property when he purchased it from Brown; it was stipulated in the act of sale that "he (Brown) does not and will not warrant" against the mortgage in favor of the Clinton and Port Hudson Railroad Company.

Bythell Haynes was the liquidator of the Clinton and Port Hudson Railroad Company at the time the Gaslight Company recovered their judgment. With a knowledge of all the facts he accepted title without warranty; and we consider the application comes with bad grace for relief under the equitable powers of this court.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Rehearing refused.

The State of Louisiana v. Singleton Parks.

No. 2056.—THE STATE OF LOUISIANA v. SINGLETON PARKS.

The qualifications of jurors to serve on the grand and petit juries in the courts of the State are, that they must be qualified electors of Louisiana. Acts of 1868, No. 110.

Where one of the panel of the grand jury is disqualified, any indictment found by them is null and void, and the accused may raise the objection and show the fact after verdict.

21	251
48	601
21	251
50	1105
21	251
118	804

A PPEAL from the Thirteenth District Court, parish of Concordia. *Hough, J. S. Belden*, Attorney General, for the State. *James G. Leach* and *T. P. Farrar*, for defendant and appellant.

LUDELING, C. J. The record in this case shows that, on the same day, the defendant was indicted, arraigned and tried for the crime of murder. The jury found him guilty.

A new trial was prayed for on the grounds—1st, that the verdict of the jury was contrary to the law and the evidence; 2d, that defendant was not furnished a copy of the indictment and a list of the jury which was to try him, two entire days before the trial; 3d, that since the trial, evidence material to his defense has been discovered. Later, an amended motion for a new trial was filed. It set forth the following grounds:

1. That Robert Coulter, one of the grand jurors who constituted the grand jury which found the indictment against the defendant, was not a citizen of the United States, nor a duly qualified voter of the State of Louisiana, at the time he was elected, empaneled, sworn and charged as a grand juror, and, consequently, was not a competent juror.

2. That five of the jurors, who tried the case, had formed and expressed an opinion, adverse to the defendant, before the trial; and that the foregoing facts were not known to the defendant until after the trial.

This application was supported by the affidavit of the defendant and others.

The District Judge refused the new trial. A bill of exceptions was taken to the ruling of the Court, in which the foregoing facts, as well as the reasons of the Judge, are stated.

It will be necessary to examine only one of the questions presented by the bill of exceptions.

It appears from the record that Robert Coulter, one of the grand jurors composing the jury, which found the indictment, was incompetent, and that this fact was not known to the defendant until after the trial. Can this objection be urged after verdict.

Mr. Wharton says, "a new trial will be granted at common law, where it appears after verdict that some one of the jurors should not have been permitted to sit upon the trial, on account of an entire legal incapacity." Wharton 923; State v. Babcock, 1 Conn. 401.

This Court has decided that such an objection to a *petit juror*, who tried the case, is not good cause for a new trial, because the accused

had had an opportunity to inquire into the qualifications of the juror upon *voir dire* examination; and having waived the right accorded to him by law, he waived, with it, every objection which he might have urged to the juror; and because he should not be permitted to take the chance of a verdict in his favor, and when it is rendered against him, to complain of the incapacity of those whom he had accepted. 8 R. 596; 7 An. 122; 12 An. 679; 14 An. 461, 673.

But these reasons do not apply when the objection is urged against one of the *grand jurors* composing the jury which found the indictment. The accused had no opportunity to question the grand jurors, and to object to any of them if they had not the legal qualifications. He did not, therefore, waive any of his rights.

Neither could he urge an objection *before* trial, when he only learned of its existence *after* trial. The law does not require an impossibility.

In *The State v. Jones*, this Court said: "We find from *Hawkins' Pleas of the Crown*, book 2, chap. 25, sections 26, 27, 28, that in the construction of the statute of the 2d Henry IV., C. 9, the following points have been decided: 'That a person arraigned upon any indictment taken contrary to the purview of this statute, may plead such matter in avoidance of the indictment. That a person outlawed upon any such indictment without a trial, may show, in avoidance of the outlawry, that the indictment was taken contrary to the form of the statute. That if any of the grand jury, who find an indictment, be within any one of the exceptions of the statute, he vitiates the whole, though never so many unexceptionable persons joined with him in finding it.' We feel satisfied that this construction furnishes the nicest and safest rule of decision; and that the incompetency of one of the grand jury so to find a bill of indictment, vitiates the whole proceeding." 8 R. 617.

Prosecutions shall be by indictment or information. Constitution, art. 6.

"The qualifications of a juror to serve in any of the courts of this State shall be the following:

To be a qualified elector of the State of Louisiana." Acts of 1868, No. 110.

Robert Coulter, not being a qualified elector of the State of Louisiana, was not a competent juror, and the bill of indictment found by the grand jury of which he was a member was a nullity. The District Judge should have set aside the verdict of the jury and quashed the indictment, when the fact was brought to his knowledge.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be avoided, that the verdict of the jury be set aside, and that the case be remanded to the District Court to be proceeded with according to law.

Succession of Widow A. D. Tureaud v. L. Gex, Administrator of R. Many, deceased.

No. 2010.—SUCCESSION OF WIDOW A. D. TUREAUD v. L. GEX, Administrator of R. MANY, deceased, Opponent.

When an heir becomes the joint proprietor of mortgageable hereditary property, the mortgage resulting from the recording of a judgment against him attaches to his part or portion thereof, subject to the prior debts and mortgages of the succession. The enforcement of such mortgage is dependent upon the final settlement of the succession.

Where succession property has been sold at probate sale, the mortgage creditors may pursue the funds arising from the sale by way of third opposition to the account of the administrator, and have their mortgage rights recognized and enforced against the proceeds of the sale of the mortgaged property, the same as they could against the property itself before the sale.

A PPEAL from the District Court, parish of St. James. *Beauvais, J. Berault & Legendre*, for plaintiff and appellant. *Gaudet & Roman*, for defendant and appellee.

HOWELL, J. At the partition suit of the heirs of age, the District Judge ordered all the property (being immovable) of the succession of the widow A. D. Tureaud, declared to be held in common by the legal heirs, to be sold in block, which brought \$100,000 payable according to the decree, \$40,000 cash, and the balance in three equal installments, each payment divided into as many notes as the administrator required for the purpose of making a partition thereof among the heirs. After the sale the administrator, one of the heirs, filed a final account of his administration, showing a balance in cash of \$33,000, and notes amounting to \$60,000 in his hands for partition among the heirs, of which he made and filed along with the above account, what he termed a "tableau of partition," allotting a sum of \$18,600 to each heir, and he prayed that public notice of the filing of both, with his prayer for discharge be given; that the heirs be severally cited, that after due proceedings the account and "tableau" be homologated; that he be authorized to settle with the heirs and all concerned agreeably thereto, and that upon filing evidence of settlement with the said heirs and all concerned, he be discharged.

The homologation of said account and tableau was opposed by L. Gex, administrator of R. Many, deceased, a creditor by judgment duly recorded, of Emile Tureaud, one of the said heirs, on the ground that the recording of his said judgment, against said Emile Tureaud, prior to the sale for partition, operated as a judicial mortgage on all the property of the said debtor, and entitled him to be paid the amount thereof out of the portion accruing to the latter; and he prayed that the administrator of the succession of widow Tureaud be condemned to pay the amount of said judgment, interest and costs accordingly.

The administrator of this succession excepted to the petition of opposition; that it showed no cause of action and no claim against the estate of widow Tureaud or the administrator, and answered that, upon receiving the price of the property sold, and reserving the sum necessary to pay the debts then outstanding and charges of the estate, the amount of cash and notes accruing to said Emile Tureaud by said

21	258
46	686
46	1026
21	258
47	805

21	258
48	745

21	358
50	372

21	258
110	88

Succession of Widow A. D. Tureaud v. L. Gex, Administrator of R. Many, deceased.

tableau of partition was paid over to him long previous to the filing of this opposition; that as administrator he was not bound to take notice of the pretended judicial mortgage against said Emile Tureaud; that at the time of making the distribution among the heirs as aforesaid, the case of the said Gex, administrator, v. E. Tureaud, in which the alleged judgment was rendered, was on appeal in the Supreme Court, and that in no capacity had he the right to withhold from said E. Tureaud any sum to pay such judgment as might be rendered in said suit; and he called in warranty the said Emile Tureaud, who filed a general denial to the opposition, defended the administrator in his course of distributing the funds among the heirs without taking cognizance of any proceeding or process instituted by the opponent, denied the right of the latter, being no creditor of this succession, to intervene in this cause, and prayed that the opposition be dismissed and the account be homologated.

The exception was maintained, and the opponent appealed.

We would remark here that the fact of the partition being made by the administrator, and his call upon all persons concerned to show cause why his account of administration and "tableau of partition" should not be homologated, and the funds distributed and paid accordingly, may make this case one *sui generis*; and the question we are called on by the parties to decide upon the exception is, does the opponent, under the law, disclose a right of action or a right to demand, in this form of proceeding, to be paid the amount of his judgment against one of the heirs, duly recorded before the sale for a partition, out of the portion of the proceeds of the immovable hereditary property in the hands of the administrator, and according to his said judgment debtor?

The answer to this question depends on the solution of the primary question whether or not a judicial mortgage attaches to the undivided share of an heir in the mortgageable property of a succession.

Some doubt is cast upon this point in the opinion of two of the judges in giving the decision of the majority of the court, in the case of Voorhies v. DeBlanc, 12 A. 864; but an examination of that case will show that the point was not decided, nor was it directly presented.

The right of a coheir or coproprietor to create a *conventional* mortgage on his undivided share of immovable property has been frequently recognized and enforced. See 12 R. 450; 3 A. 542; 9 A. 212; 12 A. 236; 19 A. 167; C. C. 3268, 1434. This last article provides that the heir to whose share an immovable or other thing susceptible of mortgage has fallen, is not bound by the mortgages which his coheirs may have given on their individual shares of the same previous to the partition, and these mortgages are dissolved of right, except upon the property which falls to the heirs who have given the mortgages, if the property is susceptible of being mortgaged. Article 3268 implies that one having a right that is suspended by a condition, or may be extinguished in certain cases, may agree to a mortgage subject to the same condition and liable to the same extinction.

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The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir, as if there had been no interruption and independent of the *fact* of possession; and each of several heirs becomes an undivided proprietor of the effects of the succession for the part or portion coming to him, which forms among the heirs a community of property as long as it remains undivided. C. C. 936, 1214.

Now, article 3290 declares that the judicial mortgage takes effect from the day on which the judgment is pronounced, if it has been duly recorded; and article 3296 says the judicial mortgage may be enforced against all the immovables which the debtor actually owns at the date of the recording, or may subsequently acquire.

When, therefore, an heir becomes the joint proprietor of mortgageable hereditary property, the mortgage resulting from the recording of a judgment against him attaches to his part or portion thereof, subject, however, to the prior debts and mortgages of the succession, and its enforcement is dependent upon the final settlement of the succession.

In this case the record shows, as to the point under consideration, that Emile Tureaud was a proprietor in common with his coheirs, of the hereditary property, which was all immovable, and according to the foregoing principles, the judgment in favor of the opponent having been recorded *prior to the sale*, operated as a judicial mortgage on his share. A similar principle is recognized in the case of the Union Bank v. Marin, 3 A. 34, 36, where it is distinctly announced that the legal mortgage of minors attaches on the undivided share of their tutor in the immovables of a succession as soon as he accepts it, subject to the right of priority of the creditors of the succession. Article 3362 C. C. makes no distinction as to the kind of mortgage, whether conventional, legal or judicial, and it provides that the mortgages shall be paid out of the funds according to their rank.

The next, or the original question here arises, as to the right of the creditor with a judicial mortgage to claim, by way of opposition, as done here (which we liken to a third opposition), the funds in the hands of the administrator accruing to his judgment debtor, and is not without difficulty.

If the property had been partitioned in kind, the mortgage in question would have attached to and could have been enforced against the share allotted to the judgment debtor. C. C. 1434; Acts of 1855, p. 337. And if the mortgage were conventional, it would, according to the interpretation given to the above article and statute, in the succession of Pigneguy, 12 R. 450, have been raised from the property and attached to the proceeds. This doctrine has been reaffirmed in 9 A. 212, and 12 A. 236, and is recognized in the case of DeBlanc v. Dumastrait, 3 A. 546. But the rule is deemed by some to be different as to general mortgages, and the articles 710 *et seq.* C. P. said to apply. In Lecar-

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pentier v. Lecarpentier, 5 A. 499, it is said, the act of 1843, p. 44, re-enacted 1855, p. 337, is not applicable to licitations under which the property is adjudicated to a party having previously no interest in it, and the intimation in Union Bank v. Marin, 3 A. 36, that a public sale under a consent decree caused the minor's mortgage to attach to the proceeds, was declared to have originated in a misreading of the act of 1843. But in Fabre v. Hepp, 7 A. 9, it was held that the sale under an order of the court of the tutor's property, with the undivided interest of his deceased spouse, released the mortgage in favor of the minor as to all the property, which doctrine Mr. Justice Rost, who dissented at the time, said in 7 A. 612, had become a rule of property, and should be respected. These conflicting views, it will be seen, arose in contests with the purchasers of the property sold, which was sought afterwards to be held liable to the general mortgages; and the difficulty may probably be considered as waived or removed in this case by the mortgagee's pursuing the proceeds instead of the property. And after anxious and mature deliberation, we have concluded that the opponent herein has set out in his petition a cause of action—a right to be paid out of the funds which the administrator declares, in his tableau and petition, are in his hands as belonging and to be paid over to Emile Tureaud, the judgment debtor of the opponent, and which, under the pleadings and facts of this case, must be held to be liable in his hands to the demand of the opponent.

If the mortgage attached to the property, and was raised therefrom by the sale under an order of court, it would seem to be a legal sequence that it attached to the proceeds in the hands of the administrator, and the mortgagee entitled thereto, may take legal steps to recover them. And the right of creditors of heirs to intervene in the proceedings for a partition is not unknown to our law. Article 1342 C. C. expressly accords it to creditors holding mortgages created by the donee on property to be collated, in order to oppose the collation which may injure their rights.

It is therefore ordered that the judgment appealed from be reversed; that the exception of the administrator, Tureaud, be overruled, and this cause remanded to the lower court to be proceeded in according to law, on the opposition of L. Gex, administrator of R. Many, deceased. Costs of appeal to be paid by the appellees.

No. 2096.—STATE OF LOUISIANA v. GEORGE A. FOSDICK.

The penalties imposed on merchants for selling hay in the city of New Orleans without first having it inspected according to law is not a tax upon imports or upon the produce of other States of the Union brought here for sale, but is simply a protection to the public against the introduction of commodities that are unfit for commerce.

The Constitution of the United States expressly permits the States to pass inspection laws.

APPEAL from the Third Justice's Court, parish of Orleans. *Montamat*, J. P. *Hornor & Benedict*, for the State, appellee. *Given Campbell*, for defendant and appellant.

WILY, J. The State sues to recover from the defendant the penalty of one hundred dollars for selling one hundred bales of hay without having them inspected as required by the act of the twenty-eighth March, 1867, entitled "An Act to establish the office of Inspector of Hay for the city and port of New Orleans, and to regulate the duties appertaining to the same," and by the Act amendatory thereof, approved September 18, 1868.

The answer admits that the defendant sold the hay without having the same inspected under the acts of the Legislature referred to; but denies any liability to the State for violating said acts; it avers that the hay was produced in New York and consigned to him by citizens of that State for sale, and acting as a commission merchant, he sold it shortly after its arrival in the same packages in which it was prepared for market by its owners in New York. "That the hay thus introduced into the State of Louisiana from the State of New York and thus sold, is exempt from import duty and other tax for the benefit of the State of Louisiana." That said laws compelling said inspection and imposing a penalty for failing to comply therewith, are in conflict with the Constitution of the United States, and therefore void, being in effect laws levying import duties and regulating commerce between the States.

The court below gave judgment for plaintiff and the defendant has appealed.

The facts are not disputed; the defendant sold the hay without having it inspected as required by law, and the State claims the penalty prescribed in the law.

The act of the eighteenth of September, 1868, amendatory of the third section of the act of twenty-eighth March, 1867, makes it the duty of the inspectors of hay to inspect all lots of hay in the city. * * It further provides "that no hay shall be sold in the city of New Orleans until it has been once inspected as provided for in this act, and that any person who shall sell hay in said city and port that has not been inspected as aforesaid, shall be liable to a penalty of one dollar for every bale so sold, to be recovered with costs of suit, in any court of competent jurisdiction.

The question to be considered is whether this act violates the Constitution of the United States. Article 1, section 8, clause 3 declares that: "the Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The second clause, section ten, of the same article provides that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, *except what may be absolutely necessary for executing its inspection laws.*" * * *

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The object of the inspection laws is doubtless to ascertain whether the merchandise is fit for commerce and to protect the community from fraud. In the act we are now considering we can perceive no import duty or tax, nor any benefit resulting to the State except to protect its citizens and its market from commodities that are unfit for commerce. The fees allowed to the inspection officers are only a remuneration for their services; the defendant has not complained that they are excessive. The issue is not that the fees allowed the inspection officers are more than are absolutely necessary, but that the law itself in effect levies import duties and regulates commerce between the States, which the Constitution of the United States prohibits.

We do not perceive that the acts referred to levy any imposts or tax upon the products of other States sold in this State.

The State derives no revenues therefrom. The acts are in the nature of police regulations established for the protection of the markets of this city against the sale of products unfit for commerce. The Constitution expressly permits the States to pass inspection laws.

The authorities cited by defendant do not apply to this case.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 2175.—STATE OF LOUISIANA, ex rel. W. J. SANDLIN, District Attorney, v. THE JUDGE OF THE ELEVENTH DISTRICT OF LOUISIANA.

A party cannot be sued at any other domicile or before any other court than the one having jurisdiction over the place of his residence. By the provisions of the act of the Legislature, approved April 19, 1861, No. 173, any party, defendant, is prohibited from electing any other domicile than that of his residence for the purpose of being sued. Acts of 1861, page 137.

A PPEAL from the District Court, parish of Caddo, *Levisse, J. S. Belden*, Attorney General, for the State, appellant. *O. Roselius*, for defendant and appellee.

HOWELL, J. This is a proceeding under the act, No. 156, approved October 15, 1863, (session acts, p. 199) to declare the defendant disqualified to hold the office of Judge of the Eleventh District.

The defendant is a resident of the parish of Claiborne, and, by consent, the suit was instituted and tried in the parish of Caddo, which we consider prohibited by article 162 C. P., as amended by act approved nineteenth March, 1861, which declares that no one shall be permitted to elect any other domicile or residence than his own for the purpose of being sued, except where expressly provided by law. There is no law making this case an exception.

The Constitution, article 90, has directed how a case may be tried when the judge of the court is interested. Consent cannot give jurisdiction against the law.

It is therefore ordered that the judgment appealed from be reversed and this action dismissed, without prejudice to the rights of the parties. The appellee to pay costs of appeal.

J. M. Juillard v. P. Rogay.

No. 1095.—J. M. JUILLARD v. P. ROGAY.

Where a party, during the late war, placed a large amount of Confederate treasury notes in the hands of another as agent, to invest in the purchase of cotton, and the agent failed to give a correct and faithful account of the transactions to his principal, no action will lie to enforce a settlement of the dispute between the principal and agent.

APPEAL from the Fourth District Court of New Orleans. *Théard, J. A. & M. Voorhies*, for plaintiff and appellant. *A. Robert*, for defendant and appellee.

WILY, J. Plaintiff sues the defendant to recover the value of seventy-eight bales of cotton which he alleges the defendant bought, as his agent, with his funds, and afterwards illegally sold and appropriated the proceeds to his own use.

The supplemental petition alleges that in January, 1865, petitioner by verbal agreement, appointed the defendant his agent to purchase cotton for him in the parish of Natchitoches, and that in a few weeks thereafter said Rogay purchased said cotton from the persons named in the original petition or account annexed, with funds which he had entrusted to him for that purpose.

The answer denies generally the allegations of the petitioner, and avers that the only transactions the defendant ever had with him was to sell him a lot of cotton in February, 1864.

The court below rendered judgment in favor of the defendant, and plaintiff has appealed.

It appears that the defendant, Rogay, was introduced to the plaintiff in this city in the early part of January, 1864, and sold him twenty-five bales of cotton then on Soldini's plantation, in the parish of Natchitoches. That about the same time the plaintiff gave the defendant \$6000 in Confederate treasury notes, to invest in cotton for him in said parish. It appears that the defendant was a cotton speculator, having made investments therein before he knew the plaintiff, and having continued to purchase for himself after he had received the funds of the plaintiff. Shortly after receiving said funds from the plaintiff he went to Natchitoches parish and purchased some cotton; he returned and had a settlement with plaintiff, paying him over three hundred dollars in Confederate notes and turning over to him twelve bales of cotton at Mrs. McTier's at ninety-five cents per pound, amounting to \$5700. He also sold the plaintiff several other lots of cotton stored on different plantations in said parish.

The plaintiff subsequently went to said parish to look after his cotton, and was not permitted to ship it by the Confederate authorities then occupying the parish. It was afterwards burnt or stolen except eighteen bales, which the plaintiff recovered.

Plaintiff instituted suit against Mrs. McTier for the cotton on her place, and recovered judgment against her for its value.

Plaintiff contends that his agent, the defendant, was unfaithful in reporting to him the cost of the McTier cotton at ninety-five cents per pound, whereas, in fact, she sold it for only six cents per pound in the seed; that the defendant invested the \$5700 of his money in the purchase of the various lots which he afterwards sold to him; that plaintiff actually purchased his own cotton from his agent.

The evidence does not establish the allegations of plaintiff.

There is no positive and satisfactory proof in the record, the witnesses appearing to derive their knowledge only from the statements of the plaintiff and the defendant in various conversations had with them, not in the presence of each other.

Their testimony fails to establish that any of the lots of cotton except the McTier lot were purchased by the defendant with the funds of the plaintiff.

Mrs. McTier testifies that she sold her cotton at six cents per pound in the seed to Edward Seichepein. We do not think the proof is conclusive that defendant bought the cotton for his principal at that price. The evidence, however, discloses that the funds placed in the hands of the defendant were Confederate treasury notes, and if the agent has not accounted satisfactorily to his principal for them, we cannot lend the aid of this court to settle disputes in reference to an unlawful currency. If the agent bought cotton at six cents per pound and accounted to his principal in cotton at ninety-five cents per pound, then he would owe him the difference between the actual and pretended price paid therefor. We cannot give judgment against the defendant for this difference in price without sanctioning transactions in a currency reprobated by law.

However contradictory and absurd the two affidavits of the defendant may be, they do not satisfactorily establish the main position of the plaintiff that his agent sold him the McTier cotton and the Soldini cotton which already belonged to him, having been previously bought with his own funds.

The cotton at Mrs. McTier's was bought for plaintiff and accounted for by his agent at ninety-five cents per pound.

The testimony of Valade and the admissions of the parties in the record prove that the twenty-five bales on Soldini's plantation were purchased by the plaintiff from the defendant at the time they became acquainted, and before he had the funds of the plaintiff. Plaintiff admitted he bought from defendant the twenty-five bales on Soldini's plantation in the fore part of January, 1864, and paid him \$1625 or thereabouts therefor. In his amended petition he only claims that he appointed the defendant his agent in January, 1865.

We do not think the affidavit of the defendant sufficiently overcomes the allegations and admissions of the plaintiff to establish his previous ownership of the cotton.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Louis Trost v. Moses Fox and Henry Weber.

No. 1495.—LOUIS TROST *v.* MOSES FOX and HENRY WEBER.

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No appeal lies from a judgment not signed by the judge. C. P. 546 ; 3 An. 62 ; 12 An. 756.

A PPEAL from the Fourth District Court of the parish of Orleans.
A Théard, J. W. W. Handlin, for plaintiff and appellee. *J. J. E. Planchard*, for defendants and appellants.

LEDELING, C. J. The record in this case shows that the judgment appealed from is not complete—it is not signed by the District Judge. Code of Practice article 546 ; 17 La. 485 ; 4 R. 52 ; 3 An. 62 ; 12 An. 756.

It is therefore ordered that the appeal be dismissed at the cost of the defendants and appellants.

Rehearing refused.

No. 2116.—B. SILVERNAGLE & CO. *v.* WILLIAM EAST, Administrator.

Where more than five years have elapsed after the maturity of a promissory note, before suit is brought, and no interruption or renunciation is shown, the plea will prevail. C. C. 3505 ; 2 An. 131, 503.

A PPEAL from the Fifth District Court, parish of East Feliciana.
A Posey, J. W. F. Kernan and S. B. Lyons, for plaintiffs and appellees. *J. H. Muse, L. M. Pipkin, Cross & Hardee and Race, Foster & E. T. Merrick*, for defendant and appellant.

WYLY, J. Defendant has appealed from a judgment against him as administrator of the succession of William and Mary Sandle, on two promissory notes—one due on first November, 1861, and the other due seventeenth May, 1862.

The defense is a general denial and the prescription of five years.

This suit was instituted after the prescription of five years had accrued on each of the notes. There is no renunciation or interruption of prescription proved.

Plaintiffs have without avail attempted to avoid the consequences of prescription by proving that judicial proceedings could not be instituted on account of the rebellion. The plea of prescription is well taken. C. C. 3505 ; *Rabel v. Pourcien*, 20 A. 132 ; *Smith v. Stewart*, lately decided.

It is therefore ordered that the judgment appealed from be avoided and annulled, and that this suit be dismissed at plaintiffs' costs in both courts.

1805.—H. PEYCHAUD et al. v. CITIZENS' BANK OF LOUISIANA.

Where mortgage creditors claim the proceeds of the sale of mortgage property made under a judgment, they cannot be permitted to allege the extinction of the judgment and the consequent nullity of the sale under which the proceeds were realized.

Where there are two separate debts, and to secure the payments of which two separate mortgages are given on the same property, the date of registry of the mortgages will determine the rights of the holders.

A PPEAL from the Fifth District Court of the parish of Orleans. *Léaumont, J. A. & M. Voorhies*, for plaintiffs and appellants. *Semmes & Mott*, for defendant and appellee.

LUDELING, C. J. On the ninth of April, 1858, Littlejohn Brothers mortgaged their plantation to E. A. Rawlins, to secure the payment of a debt of \$17,207, with eight per cent. interest per annum from the first April, 1858, and a note of \$1039 14, with eight per cent. interest per annum from the first of March, 1859, and five per centum attorney's fees.

This mortgage was recorded on the fifteenth of April, 1858. On the ninth of July, 1859, Rawlins transferred this mortgage claim to Burbridge & Co.

On the thirteenth of July, 1859, Burbridge & Co. obtained a judgment against Littlejohn for the sums above stated, with a recognition of the mortgage of the ninth of April, 1858.

This judgment was duly recorded in the mortgage record in the parish of Assumption, where the plantation is situated, on the sixteenth of July, 1859.

On the twenty-eighth of March, 1860, Bellocq, Noblom & Co. paid this judgment to Burbridge & Co., and they were expressly subrogated to all the rights of Burbridge & Co.

On the thirtieth day of March, 1860, William Littlejohn executed a mortgage in favor of Bellocq, Noblom & Co.

In the act of mortgage he recites that he is largely indebted to Bellocq, Noblom & Co., and particularly "in first, a sum of \$3500 paid by said firm for his account to Joseph B. Littlejohn; and second, a sum of \$23,275 33, paid by said firm for his account to J. W. Burbridge & Co., the transferees of E. A. Rawlins, which amounts had to be paid in conformity with the conditions of an act of sale from J. B. Littlejohn to him, said William Littlejohn, and an act of agreement with Willie G. Littlejohn."

It recites further that he is unable to pay his debts in cash, and is desirous to extend the same, and to have the aid of Bellocq, Noblom & Co. to carry on his business; and he mortgages his plantation, etc., to them to secure the debts due and to be contracted, not to exceed together \$110,000, *exclusive* of interest.

The Citizens' Bank, under executions and judgments against Bellocq, Noblom & Co., seized all the rights, title and interest of Bellocq, Noblom & Co. in and to the judgment recovered by J. W. Burbridge & Co. against William Littlejohn; and at the sale the Citizens' Bank

bought the judgment. Execution was then issued under the judgment, and the plantation of Littlejohn was sold by the Sheriff to the bank for \$31,000.

The plaintiffs, syndics of Bellocq, Noblom & Co., sued the Citizens' Bank to recover the price of the sale "for distribution in due course of law;" and "in case the court should be of opinion that said bank, as adjudicatee of the judgment of J. W. Burbridge & Co. v. Littlejohn, is entitled to a *pro rata* portion of said fund, then that petitioners recover of said bank twenty-four thousand nine hundred and twenty-two dollars," with interest and costs. Several holders of notes drawn by Littlejohn and endorsed by him, which are secured by the mortgage executed in March, 1860, intervened and joined the plaintiffs in their demand against the bank.

The question presented for decision is, which mortgage is superior in rank, that of Burbridge & Co., acquired by the Citizens' Bank, or the mortgage executed by Littlejohn in favor of Bellocq, Noblom & Company?

We say this is the question for decision, because it was admitted by plaintiffs' counsel in argument that the Burbridge judgment was not *novated*, and the act of the thirtieth March, 1860, itself clearly shows that the judgment is not *novated*.

Besides, the plaintiffs and intervenors are claiming the proceeds of the sale made under the judgment; they cannot be permitted, therefore, to allege the extinction of the judgment, and consequent nullity of the sale under which the proceeds were realized. *Livaudais v. Livaudais*, 3 An. 455.

It is, however, contended by the plaintiffs' counsel that the bank has no greater right than Bellocq, Noblom & Co. had in the judgment, and that the latter could not have asserted the priority of the Burbridge mortgage over theirs successfully.

This, we think, is an error. The principle announced in the case of *Solzman v. his creditors*, 2 R. 241, and *Ventress v. his creditors*, 20 An. 359, is not so broad as contended for by plaintiffs' counsel. In the case cited, parts or installments of *one debt* secured by a mortgage were transferred to third parties. The court held that the original mortgagee having sold a part of his claim, could not compete with his transferees for the proceeds of the mortgaged property.

In the case at bar, however, there are two separate debts and two distinct mortgages. And the rights of the holders of the debts secured by these two distinct mortgages must be determined by the dates of the registry of the mortgages.

The mortgage under which the Citizens' Bank claims is dated ninth April, 1858; the mortgage under which the plaintiffs and the intervenors claim was passed on the thirtieth March, 1860.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, and that the appellants pay the costs of appeal.

No. 1471.—SUCCESSION OF C. ESPINOLA.

To give the Supreme Court jurisdiction of the appeal the amount in dispute must exceed \$500. *Myers v. Mitchell*, 20 An. p. 532.

A general allegation of opposition to all the items on the debit side of the account, without proof to sustain it, will not give the Supreme Court jurisdiction. The amount over which there is a contest only can be taken into consideration in determining the question of jurisdiction, and if not above five hundred dollars, the appeal will be dismissed.

APPEAL from the Second District Court of New Orleans. *Thomas, J. E. Filleul*, for administrator, appellant. *D. C. Labatt* and *W. W. Handlin*, for opponents, appellees.

HOWELL, J. On the sixth March, 1867, the administrator of this succession filed an account of his administration, showing assets amounting to \$9093 33, and debts and charges amounting to \$4346 06, to which two oppositions were made—one by Messrs. Semmes & Labatt, claiming to be recognized as creditors for \$350 for professional services, and one by C. Tarafa, of Cuba, asking that all the items on the debit side of the account be reduced as excessive, and that he have judgment against the succession for fifty dollars in gold deposited with C. Espinola in December, 1859, with interest from the twenty-seventh September, 1864. The account so far as not opposed, was homologated on the nineteenth March, 1867.

The opposition of Semmes & Labatt was maintained; that of Tarafa in part by allowing \$35, and the administrator appealed. Tarafa by answer joins in the appeal, and asks that the judgment be amended in his favor by allowing him fifty dollars in gold or exchange, and interest and costs as claimed below.

The appellant in his brief states that the claim of Semmes & Labatt, who make no appearance in this court, has been settled, and that the only matter now in controversy is the sum of fifteen dollars, the difference between the amount claimed by and that allowed to the opponent, Tarafa, who in his oral and printed argument insists upon a judgment for fifty dollars in gold with interest.

Although Tarafa opposed all the items on the debit side of the account as excessive, and asked that they be reduced, there was no contest as to them in the lower court, nor evidence touching them—nothing said about them here. The only matters contested there were the claims of Semmes & Labatt and of Tarafa, which together do not amount to five hundred dollars, and their allowance would not affect the claims of the other creditors. In such a case, the fact that the value of the succession or the amount distributed by the administrator exceeds that sum, does not give jurisdiction to this court. It is the matter in dispute only that gives it. If the amount over which there is a contest exceeds five hundred dollars, this court would, under the settled jurisprudence, entertain the cause, although no one of the claims reached that sum. Such is not the case here.

It is therefore ordered that the appeal herein be dismissed at the costs of the appellant, the succession of C. Espinola.

State of Louisiana v. James O'Brien alias Francis O'Brien.

No. 2150. — STATE OF LOUISIANA v. JAMES O'BRIEN *alias* FRANCIS O'BRIEN.

A party convicted by a jury, on the information of the District Attorney, of the crime of larceny, cannot urge in arrest of judgment that the charge of burglary is not properly set out in the information.

APPEAL from the First District Court, parish of Orleans. *Abell, J. S. Belden*, Attorney General, for the State, appellee. *J. J. E. Planchard*, for defendant and appellant.

WILLY, J. The defendant appeals from a judgment convicting him of the crime of larceny.

The information on which he was tried contains two counts, burglary and larceny.

The accused excepted to the proceeding on the following grounds, viz:

First—The word "*burglariously*," which is necessary, is not mentioned;

Second—The information is vague and not specific, nor is the time mentioned at which the burglary was committed;

Third—The goods taken are not sufficiently described.

It is unnecessary to inquire whether the charge of burglary was properly set out in the information, as the defendant was convicted under the count of larceny.

It appears in the information that the defendant is charged with breaking and entering the dwelling house of Anatol Voisin, in the parish of Orleans, with intent to steal, on the night of the eighth day of November, 1868; and "at the time and place aforesaid," that the accused feloniously did steal and carry away nine pieces of silk of the value of one hundred dollars apiece, four silk velvet cloaks of the value of one hundred dollars each, and three skirts of the value of five dollars each, the goods, property and chattels of the said Voisin, there being found, &c.

The allegations in the information are sufficiently specific as to the time the offense of larceny was committed, as to the description of the things stolen, and in all other respects.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 1499.—RICHARD FRANCIS v. W. T. LAVINE et als.

In a suit for the liquidation and settlement of partnership transactions and accounts and a partition of the property held in common, all the partners or parties interested must be cited and made parties.

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APPEAL from the Second Judicial District Court, parish of Plaquemines. *Casabat, J. E. Howard McCaleb*, for plaintiff and appellee. *M. B. Dubuisson* and *George L. Bright*, for defendants and appellants.

LUDELING, C. J. This is a suit for a settlement of a partnership and partition of the partnership property,

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John T. Gersdorf, and others of the defendants, have not been cited. The sheriff's return states that service of citation was made "by leaving the same with Asa Payson, the captain of the Pilot's Association, at Southwest Pass, in this parish, the said Gersdorf being absent at the time of said service." A similar return was made on the citations directed to three others of the defendants. The service is defective. C. P. Arts. 187, 190. It is well settled that in suits for the liquidation and settlement of partnership transactions and accounts, and for a partition of property held in common, all the partners, or parties interested, must be made parties to the suit. 6 N. S. 188; 6 La. 689.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be reversed, and that this case be remanded to be proceeded with according to law.

No. 1894.—P. H. MORGAN v. F. TAMIET.

A, in his capacity of lessor, brought suit against B, his lessee, for rent; A afterward brought suit against B to annul the lease and restore the leased premises. B excepted to the latter suit on the ground that the same cause of action was pending in the other suit. Soon after filing this exception of *lis pendens* to the suit to annul the lease, B filed an answer to the suit for rent, setting up a reconventional demand in damages, with a prayer that he be quieted in the possession of the premises leased, and argued on the trial of the exception of *lis pendens* that the issue created by the answer was the same as the demand for possession in the suit to annul the lease.

Held—that B could not urge the pendency of a contestation thus created by himself against a prior demand of A.

A PPEAL from the Fifth District Court for the parish of Orleans. Léaumont, J. A. & M. Voorhies, for plaintiff and appellant, E. Bermudez, for defendant and appellee.

HOWE, J. The plaintiff instituted this action to annul a lease made by public act by and between himself as lessor, and the defendant as lessee, on the ground that the latter has violated its provisions by failing to pay the rent and certain taxes. The prayer of the petition is that the lease be annulled and that the property therein leased be returned to plaintiff and that he be put in possession of the same.

The defendant filed the declinatory exception of *lis pendens*, averring that similar suits involving the same cause of action and demand had been previously instituted, and were still pending in the Second Justice's Court of New Orleans, the Third District Court of New Orleans, and the Fifth District Court for the parish of Orleans. The Court below dismissed the exception, and the cause having been tried on the merits, and judgment having been rendered in favor of plaintiff as prayed for, the defendant has appealed.

The exception was properly discussed. None of the suits mentioned in the exception constituted *lis pendens* as to the controversy now before us. The suit in the Justice's Court was for an amount of taxes alleged to be due by the tenant. The suit in the Third District Court was for rent. In each a judgment for money only was demanded, and

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no decree dissolving the lease and restoring the property to the landlord could have been rendered. The same may be said of the suit pending in the Fifth District Court; but it is contended by the defendant that, because in the last named suit he filed a plea in reconvention, claiming large damages, and praying "to be quieted in the possession of the leased premises," the plea of *lis pendens* must be maintained as against the suit at bar, which is a suit to recover possession. It appears, however, that the petition of plaintiff thus excepted to was filed October 5, 1868, that the exception of *lis pendens* was filed October 19, 1868, and that the claim in reconvention in the other case, with the prayer to be quieted in possession, was filed October 29, 1868. If the effect of this claim and prayer was to make an issue identical with that now before us, as the defendant contends, we can conceive that the plaintiff might plead *lis pendens*, but it is difficult to perceive how the defendant can urge the pendency of a contestation thus created by himself against a *prior* demand of the plaintiff.

In the case before us the plaintiff sues for a different object from any embraced in the other suits we have recited. The distinction between an action for rent, which is in enforcement of the contract to pay it, and leaves the tenant in possession, and an action to dissolve the lease and to recover the property, is plain.

Upon the merits the case is free from doubt. The defendant has failed to pay his rent as it fell due, and as demanded, and the judgment was properly rendered in favor of the plaintiff as prayed for.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 2117.—PEET, SIMMS & CO. v. JARED R. JACKSON et al.

Where a promissory note is prescribed on its face, and no interruption is shown, the plea will prevail. 20 An. 131, 565.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. Posey, J. McVea & Kilborn, for plaintiffs and appellees. Race, Foster & E. T. Merrick and Cross & Hardee, for defendants and appellants.

Howe, J. The bill of exchange sued upon in this case matured on the fourth December, 1861, and the suit was not instituted until the eighteenth January, 1868. Neither interruption nor renunciation of prescription is shown. The plea of prescription of five years filed in the court below should have been sustained. *Rabel v. Pourciau*, 20 An. 132; *Smith v. Stewart*, lately decided.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment for the defendants, with costs in both courts.

I. Blum & Co. v. Alexander L. Marks; Wright, Brinkerhoff & Co. v. The Same.—Sonneborn & Co., Herman, Auguste & Co., M. Herzog & Co., and L. Dryfoos & Co., Intervenors, etc.

1498.—I. BLUM & CO. v. ALEXANDER L. MARKS; WRIGHT, BRINKERHOFF & CO. v. THE SAME.—SONNEBORN & CO., HERMAN, AUGUSTE & CO., M. HERZOG & CO., and L. DRYFOOS & CO., Intervenors, etc.

[Consolidated Cases.]

The Courts of Louisiana will recognize and enforce the right of stoppage in transit arising from a sale of goods in New York to an insolvent residing in New Orleans.

The transit of the goods is not at an end while in the custody of the carrier, and before they have been delivered to the consignee.

To entitle the vendor to have the goods stopped in transit he must show that, at the time of the sale, he was ignorant of the insolvency of the vendee. The discovery of the insolvency before the delivery is sufficient to entitle the vendor to the exercise of the right, although the goods may have been attached by a creditor of the vendee.

A PPEAL from the Third District Court of New Orleans. *Fellowes, J. Thomas J. Cooley*, for plaintiffs and appellees. *Phillips & Levy, Hornor & Benedict*, and *A. L. Tissot*, for intervenors and appellants.

HOWE, J. The plaintiffs in these cases, residents of the city of New York, attached on board the steamship "Star of the Union," upon her arrival at this port on the twenty-fourth of April, 1866, certain merchandise which had been sold to the defendant by the intervenors about the twelfth day of the same month, and consigned on the steamer above named.

The obligations on which the plaintiffs sued were contracted February 23, 1866, and were for goods sold at a credit of sixty and ninety days, and upon notes at forty-five and sixty days.

The property seized consisted of six cases of merchandise. They never came into the actual or constructive possession of the defendant to whom they had been shipped. It appears that he had absconded after the purchase of the goods and before their arrival, and the deputy sheriff executed the writs of attachment at the moment the vessel touched her wharf in New Orleans.

The vendors of these goods intervened, claiming respectively such portion as each had sold, on the ground substantially that they had sold the property to defendant about the twelfth April; that he had become insolvent, and that they had exercised the right of stoppage in transit, in such manner and at such time as to give them a claim on the property superior to that of the plaintiffs.

Pending the litigation, and at the instance of plaintiffs, the goods were sold by the sheriff. The court *a qua* gave judgment in favor of I. Blum & Co. for the amount of their claim, to be paid by preference out of the proceeds of sale, and dismissed the claims of the plaintiffs, Wright, Brinkerhoff & Co., and the claims of all the intervenors.

From this judgment the intervenors only have appealed; and the present contest is, therefore, between I. Blum & Co. as attaching creditors, and the intervenors as vendors, who claim to have stopped the goods in transit.

It seems to be conceded by the parties, that the courts of this State will recognize the right of stoppage in transit, arising from a sale in

L. Hahn & Co. v. Alexander L. Marks; Wright, Brinkerhoff & Co. v. The Same.—Sonneborn & Co., Hirsch, Augusté & Co., M. Herzog & Co., and L. Dryfoos & Co., Interveners, etc.

New York combined with such other facts as by law confer the right. It is quite clear, also, that under the facts of this case, as they will hereafter appear, the privilege of the attaching creditors must yield to the claims of the vendors, provided the latter show that they had the right of stoppage and duly exercised it. 15 Wend. 143; 15 La. 464; 9 A. 92.

It is contended by plaintiffs that, if the defendant was insolvent at all, he was insolvent at and before the time of the sale of the goods in dispute, and that therefore the right of stoppage did not exist, and this brings us to the main question in the case. It is clear that the defendant was in failing circumstances at the time he made the purchases, but we do not find at that moment any visible change in his pecuniary condition, any open and notorious act on his part, calculated to affect his credit and put the vendors on their guard. It may well be that if the intervenors knew the defendant to be insolvent at the time of sale they could not claim the right; but it is plain that in this case they were not aware of the condition of the defendant. About seven weeks before they made the sales, he had a standing in New York good enough to enable him to obtain credit from the very plaintiffs in these suits, to the extent of some eight thousand dollars. The intervenors, so far as we can discover, were not aware of any change in his pecuniary condition when they sold him the goods in controversy. They show that they shipped the goods by the *Star of the Union*; that in three or four days they learned for the first time that he was an insolvent and had absconded; that they immediately notified the carrier in New York, requiring him to hold the goods; that as to three of the intervenors, the agent of the line in New York telegraphed to the agent in New Orleans directing him to hold the goods; and that as to the other, notice was given to the agent in New Orleans by the attorneys. These telegrams were received, and this notice given, here, about four days before the steamer arrived; and the agent in New Orleans testifies that he was thus prepared to hold the goods, and would have done so if the sheriff had not taken them out of his hands. Under such circumstances, it would seem inequitable, indeed, to allow the plaintiffs to seize these goods, of which the intervenors had, practically, resumed possession.

We have been referred by plaintiffs to the case of *Rogers v. Thomas*, 20 Conn. 53, in support of the doctrine for which they contend, that the insolvency of the vendee must occur after the sale to authorize the stoppage; but the case does not fully sustain their view. In that case the Court said, p. 63:

“We think, therefore, that in order to authorize a stoppage in transitu, there should be some ostensible and certain criterion by which the insolvency of the vendee may be ascertained; and that it should consist of some sensible change in his pecuniary situation, some open, notorious act on his part, calculated to affect his credit—some change in his apparent circumstances which would operate as a surprise on the

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vendor, and which, if he had known, he would not have given credit to the vendee.

“The remaining inquiry respects the time when *such* insolvency must occur, in order to confer the right. On this point we are of opinion that it is not sufficient if it exists when the sale takes place, but that it must intervene between the sale and the exercise of such right.”

We apprehend that this language, if entirely correct, would not militate against the claims of the intervenors, for no such insolvency appears in this case until three or four days after the sale.

In *Botlingk v. Inglis*, 3 East. 381, where goods were shipped from St. Petersburg to London to a person who had committed an act of bankruptcy before the shipment, the right of stoppage was recognized, under the law merchant, as well as the Russian law.

In *Buckley v. Furniss*, 15 Wendell 139, it was considered that if the seller knew of the insolvency at the time of sale, the right might not exist, but it seemed to have been taken for granted that if he did not know of it, its covert existence would not impair the right.

In *Conyers v. Ennis*, 2 Mason 236, the vendee was “deeply and fraudulently insolvent” at the time of the sale, yet Mr. Justice Story, who delivered the opinion of the court, does not seem to have thought that this fact would destroy the right of stoppage, but the right was denied because, before its exercise, the transit had been terminated by delivery.

In his late work on mercantile law, Mr. Parsons says: “It has been held that the insolvency must occur after the sale has taken place,” and he cites the case in 20 Conn., in which, as we have seen, the word “insolvency” is used in the sense of a notorious failure of credit; “but,” he adds, “we are not disposed to consider this as the correct rule, but should hold that the right existed in case of insolvency before the sale, unless this fact were known to the vendor at the time of the sale.” Mer. Law, ed. 1862, p. 61 and notes.

In fine, if, as seems to be now well settled, the right of stoppage be only an extension of the common law lien of the seller on the thing sold for his price, we are unable to perceive any reason for the distinction sought to be established by the plaintiffs in this case, and must therefore conclude that the judgment of the District Court was erroneous.

Our attention is called to a bill of exceptions reserved by plaintiffs to the introduction by the intervenors of certain telegraphic dispatches, “purporting to be dispatches from their houses in New York to A. Moulton, agent, in New Orleans, requesting the agent to hold and not deliver certain cases of merchandise shipped by them to defendant,” on the ground that no proof was made that the papers produced were in the handwriting of any person employed in the telegraph office, or any other proof of their authenticity, and they refer to 15 An. 668.

We find in the record no such dispatches as those referred to in this bill of exceptions. It appears elsewhere that the intervenors gave due

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notice to the carrier in New York, that such notice was communicated to the agent in New Orleans in ample time, and that the goods were never delivered to the consignee. It seems unnecessary, therefore, to pass upon the bill.

For the reasons given, it is ordered and adjudged that the judgment appealed be, as to said I. Blum & Co. and the said intervenors, avoided and reversed; that the claim of said plaintiffs be dismissed as in case of non-suit; and that each of the intervenors have judgment respectively for the proceeds of the sale of the goods claimed and identified by each, with costs, to be paid as follows: to Sonneborn & Co. the proceeds of the case of goods marked "No. 7407;" to M. Herzog & Co. the proceeds of the case of shirts, etc., marked "A. L. Marks;" to L. Dryfoos & Co. the proceeds of the three cases marked "A. L. M., 1068, 1039, 1070;" and to Herman, Auguste & Co. the proceeds of the remaining one of the six cases seized and sold. It is further ordered that the appellees, I. Blum & Co., pay the costs of the appeal.

No. 1438.—*SCHNEIDER & ZUBERBIER v. N. DREYFUS.—W. H. LETCHFORD & Co., intervenors.*

To avoid the examinations of issues improperly raised by the answer, the more regular practice is, to object to the introduction of testimony to sustain them. 20 An. 193.

Where a sale of personal property has been completed by delivery (although fraudulent), the judgment creditor of the vendor cannot seize it in the hands of the purchaser until the sale is declared null by a revocatory action; the case is different in a simulation.

A PPEAL from the Sixth District Court of New Orleans. *Duplantier, A. J. Hornor & Benedict*, for plaintiffs and appellants. *Bradford, Lea & Finney*, for defendant and appellee.

HOWELL, J. Plaintiff brought suit against defendant for the amount of a bill of groceries, and, claiming the vendor's lien, caused the goods sold to be sequestered. W. H. Letchford & Co., wholesale dry goods merchants, intervened, claiming to be the owners of said goods by virtue of a transfer, by authentic act, of the contents of the grocery store of defendant, including the goods sequestered, delivery of which, it is alleged, was made before the seizure herein. Plaintiffs answered, charging said sale to be fraudulent and simulated. Judgment was rendered in favor of the intervenors, and the plaintiffs appealed.

It is shown that the deputy sheriff, charged with the writ of sequestration, found a man, wearing the badge of a police officer, in possession of the store, who referred him to the chief of police. The deputy afterwards, under instructions from the sheriff, applied to the chief of police, and was there informed that Letchford & Co. had purchased the said store, and was furnished by the chief's aid, named Boylan, with an order to the officer in charge of the store not to interfere with the sheriff. With this order the deputy and Boylan went to the store of Letchford & Co. to inform them of the intended seizure. From there

they went to the store of plaintiffs, and thence to make the seizure—all on the twenty-first September, 1866. On the trial, Letchford & Co. introduced in evidence the notarial act of sale, dated September 18, 1866, from defendant, Dreyfus, to them of the stock, fixtures and appurtenances of a grocery store at the corner of Magazine and Orange streets for the price of \$5393 09, received by satisfaction and settlement thereof being endorsed, by the vendees and holders, on the note of the vendor, Dreyfus, for said sum, dated September 7, 1866, and due at sixty days from its date, which seems to have been retained by the vendees. This act was witnessed by Boylan and Izard, two aids to the chief of police, who had accompanied a Mr. Moss, of the house of Letchford & Co., to the store of Dreyfus on the day of sale, which visit resulted in all the parties repairing to the office of the notary to pass the act of sale, after which, on the same day, the store was closed and the keys with the lease turned over to Moss, who placed the first mentioned police officer in charge as keeper—Dreyfus appearing not to have anything more to do with the store thereafter.

These aids to the chief of police profess that they acted in the matter simply as private individuals, and that no intimidation was used to induce Dreyfus to execute the act of sale. Letchford & Co. also show that Dreyfus was indebted to them for goods in the amount of the said note and for which the note was given, but was not due at the date of the sale.

It is evident, notwithstanding the unusual circumstances, that the sale was real and was followed by delivery of possession prior to the seizure under the writ of sequestration; but plaintiffs contend that, the property being movables, it was unnecessary to resort in the first place to the revocatory action, and they quote the cases of *Kirkland v. Gas Company*, 1 A. 299, and *Jonan v. Dreux*, id. 364, as authority to sustain them; and they further contend that, admitting the rule of practice to be otherwise, such rule cannot be applied in this case, as the intervenors did not file, *in limine*, an exception to the plea of fraud set up in the answer to the petition of intervention, in support of which they cite the case of *Dangian v. Blacketer*, 13 A. 595. On this point they reserved a bill of exceptions to the action of the judge *a quo* in sustaining the motion of the intervenors to strike out of the answer the charges of fraud and unjust preference and to hear no evidence thereon, which motion was made after the trial on the merits had begun and evidence admitted, and to which motion plaintiffs objected on the grounds substantially:

1. That the intervenors, not having excepted to the answer, and the parties having gone to trial on the pleadings, the motion came too late.

2. That plaintiffs had a right in law to be heard under said pleadings.

- I. The first ground is not supported by our rules of practice. Exceptions to answers are not required in our system. All the allegations of the answer are considered as denied by the plaintiff (C. P. art. 829), and two modes have been followed to exclude an examination of issues

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improperly presented: one by striking out on motion, and the other by objecting to the admission of evidence to establish them; both being in effect the same, but the latter is deemed the more regular. See *Lallands v. Ball*, 20 A. 193.

II. The second ground presents the broad question of the right to attack collaterally an actual but fraudulent sale of movable property. The rule is admitted to be different in regard to a like sale of immovable property. The only case, in which we are aware a distinction has been made, is that of *Kirkland v. Gas Company*, 1 A. 299, quoted by plaintiffs, in which the distinction seems to be based on the want of knowledge in the seizing creditor of the fact of the sale—such knowledge not being presumed in sales of property not required to be made in writing and recorded for the information of all persons. But we are unable to perceive that the law authorizes a distinction to be made on account of the character or nature of the property. The correct rule we consider to be this: a creditor may at his peril seize under any of the writs authorized by law, and if a third possessor shows that he holds under a real contract, the seizing creditor will be required to desist (except where his proceeding may be specially permitted by law), and to resort to the revocatory action. If, on the other hand, the alleged transfer is proven to be a simulation, a mere shadow cast upon the real title, the court takes no notice of it and the seizing creditor is allowed to proceed. See 1 A. 364; 2 A. 912; 14 L. 426; 2 R. 99; 11 R. 288; 6 A. 193; 18 A. 732; C. C. 1978. The only question then that can be examined collaterally, in such cases, is that of simulation. In this case the right to seize was predicated solely on the vendor's lien, and as there was a real sale, and delivery was made prior to the seizure, the lien was thereby lost (C. C. 3194,) and the annulling of such sale for fraud could not restore the privilege and thus maintain the sequestration, but would subject the property fraudulently transferred to the payment of the plaintiffs. C. C. 1972. The Code contemplates that contracts made in fraud of creditors shall be annulled by the revocatory action, and this only when the debtor has not property sufficient to pay the complaining creditor. C. C. 1965, 1966.

We must conclude that the plaintiffs could not in this indirect mode set aside a sale although fraudulent and subject the property to their writ of sequestration, and that the Judge *a quo* did not err in refusing to try the question of fraud on the intervention. He did not restrain them from proving simulation.

Judgment affirmed.

NO. 1561.—F. A. BOYLE & CO. v. KITTREDGE & EWING.

Where an open account is prescribed on its face, and the evidence fails to establish an interruption, the plea will prevail.

APPEAL from the Third District Court, parish of Lafourche. *Gates, J. B. J. Sage*, for plaintiffs and appellants. *Gentile & Whittington*, for defendants and appellees.

WYLY, J. Plaintiffs sued the defendants on an open account for plantation supplies sold them on fourth day of March, 1861. Defendants pleaded the prescription of three and five years.

There was judgment in the court below in favor of defendants and plaintiffs have appealed.

The account seems to be prescribed on its face, having been made on fourth March, 1861, and not sued upon till twenty-ninth March, 1867, when the defendants were cited.

Plaintiffs have attempted to prove the account was acknowledged by one of the defendants, Kittredge, in March, 1865.

They have offered but one witness, John H. Polhaus, who testifies as follows: "In or about the month of March, 1865, Dr. Kittredge informed me in New Orleans, when I asked him about the bills, that he would pay out of that year's crop. He said if he made a good crop he would pay it that season."

This testimony is contradicted by the evidence of Dr. Kittredge, who testifies as follows: "I reside in the parish of Assumption in this State. The Areal and Raceland plantations are situated in the parish of Lafourche, about thirty or forty miles from my residence, more or less. These plantations belong to Kittredge & Ewing, and they are controlled almost entirely, and are supplied by Dr. Ewing. I am a member of the firm of Kittredge & Ewing. I do not supply these plantations at all. I go to these plantations sometimes once a year and sometimes once every three or four years. About the time stated by Mr. Polhaus in his interrogatory, I was present at Mr. Polhaus' counting house purchasing of him a large invoice of pork and flour for my use at Elmore plantation, my residence, and while there the conversation between us was in regard to the Areal and Raceland plantations. I observed to Mr. Polhaus that those plantations had been nearly destroyed by the Confederate and Federal troops, and that instead of making anything since the war began, we had been out of pocket some twenty thousand dollars, but this year (1865) we had put in a large crop of cotton, and expected to make a good profit, provided we succeeded in our crops, and if so we might be able to pay any just and valid claim they might have against us. Mr. Polhaus then observed to me that Mr. Boyle had some claims against these plantations without showing any specified account of such claims. I answered him that I did not know anything about these claims; that Dr. Ewing was the man who attended to that, and that he must go to him. I did not acknowledge these accounts and had no idea of doing so, for I knew nothing of the articles charged therein and consequently I could not know anything about them."

The testimony of Polhaus is not sufficiently positive to establish the interruption of prescription. He does not state what particular bills were acknowledged by the defendant, nor does he state that he showed the bills or accounts to the defendant, Kittredge, and that he renounced the prescription and promised to pay them.

The testimony of Dr. Kittredge invalidates the evidence of this witness. He states positively that he did not acknowledge the accounts

F. A. Boyle & Co. v. Kittredge & Ewing.

and had no idea of doing so. We think from the evidence that plaintiffs have failed to establish the interruption of the prescription of three years pleaded by the defendants, and that that plea must prevail.

It is therefore ordered that the judgment appealed from be affirmed with costs.

ON REHEARING.

TALIAFERRO, J. The principal inquiry in this case is, was there a renunciation of prescription by defendants, or either of them, as contended by plaintiffs? The facts pertinent to this inquiry seem to be that in March, 1865, in New Orleans, at the counting house of Polhaus, the witness of plaintiffs, a conversation ensued between him and Kittredge, one of the defendants, in regard to some unpaid accounts due by Kittredge & Ewing to F. A. Boyle & Co. In his answer to the sixth interrogatory propounded to him by plaintiffs, Polhaus referring to the time at which this conversation occurred says: "In or about the month of March, 1865, Dr. Kittredge informed me, in New Orleans, when I asked him about the bills that he would pay out of that year's crop; he said that if he made a good crop he would pay it that season."

It appears that at the date of the accounts sued upon (March, 1861), the witness was the book-keeper of the plaintiffs. He annexes to his answer to the third interrogatory copies of the bills of plantation supplies, forming the claim upon which the suit is founded. When he informs us afterwards that he asked Kittredge "about the bills" we think it fair to conclude that the character and amount of this specific indebtedness was in some definite manner made known to Kittredge, although, in his own testimony he says, "Mr. Polhaus then observed that Mr. Boyle had some claims against these plantations, without showing any specified account of such claims. I answered him that I did not know anything about these claims, that Dr. Ewing was the man who attended to that, and that he must go to him." Here is a clear admission that he was informed of the plaintiff's claims, although he states that no specified account was shown to him.

The counsel of the plaintiffs in their analysis of Kittredge's reply to Polhaus, given by the latter in his answer to the sixth interrogatory, find two distinct promises: First, the declaration that "he would pay out of that year's crop," and secondly, that "if he made a good crop he would pay it that season." We see no ground for thus dividing the expressions used by the defendant. All that he said on the subject of plaintiffs' claim was said at one time, in the same connection, and on the same occasion. The words used were uttered under the same continuous expression of thought. They must be taken entire and in the sense which results from the whole together. The counsel on the part of the defendants make the point that the amount of the alleged debt exceeds five hundred dollars, and that the testimony of a single witness is insufficient, without corroborating circumstances, to establish a renunciation of prescription.

There is no evidence in the record bearing upon the gist of the controversy, but the testimony of the witness Polhaus and the defendant Kittredge himself. The plaintiffs' counsel endeavor to show that on the subject of the promise the testimony of the latter is corroborative of that of the former. We cannot so construe it. Kittredge in the conversation with Polhaus represents himself as having said to the latter: "We have put in a large crop of cotton and expect to make a good profit provided we succeed in our crops, and if so we might be able to pay any just and valid claims they might have against us." This seems to have been spoken in reference to the indebtedness of the plantations generally. More especially in reference to the plaintiffs' claim, he said, in addition to what we have already quoted: "I did not acknowledge these accounts, and I had no idea of doing so, for I knew nothing of the articles charged therein, and consequently I could not know anything about them."

We cannot find in the language used any direct, absolute promise to pay in any event. On the contrary, the promise was made with a condition, and it cannot be taken against the defendant as a clear voluntary renunciation of the prescription which had accrued.

The conclusions we make render it unnecessary to pass upon the remaining points presented. After a careful examination of the case in the aspects to which our attention has been invited, we are not convinced that any change should be made in the first decision.

It is therefore ordered that the former decree of the court rendered in this case remain unaltered. 1 Rob. 236; 5 An. 340.

No. 2115.—BANK OF KENTUCKY v. JOHN EAST.

Where a promissory note is prescribed on its face and no interruption is shown, the plea will prevail. *Rabel v. Pourciau*, 20 An. 131.

APPEAL from the District Court, parish of East Feliciana. *Posey, J. McVea & Hunter*, for plaintiff and appellee. *Race, Foster & E. T. Merrick* and *Cross & Hardie* for defendant and appellant.

HOWELL, J. This is a suit instituted in January, 1863, on a promissory note due on the nineteenth January, 1862, to which the defendant set up the prescription of five years.

Prescription accrued on the nineteenth January, 1867, and no legal interruption is shown. C. C. 3505; *Rabel v. Pourciau*, 20 An. 132; *Smith v. Stewart*, lately decided.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of defendant with costs in both courts.

MRS. L. J. NOLAND v. MRS. M. C. STERLING.

No. 1298.—MRS. L. J. NOLAND v. MRS. M. C. STERLING.

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Where suit was brought before the United States Provisional Court, but not decided before that tribunal ceased to exist, between parties residing in this State, the plea of *lis pendens* will not prevail in a suit before the State Courts on the same obligation and between the same parties, on the ground that both parties being residents of the State the case could not be transferred to the United States Circuit Court.

A PPEAL from the District Court, parish of West Feliciana. *Cooley, J. Wickliffe & Miller*, for plaintiff and appellee, *W. D. Winter*, for defendant and appellant.

HOWELL, J. This suit is brought on a promissory note alleged to be made by defendant's agent to the order of and duly indorsed by Mr. G. F. McRea, to which defendant pleaded the exception of *lis pendens*, averring that a suit against her by plaintiff on the same note is pending in the United States Provisional Court.

This exception was maintained by our predecessors, and on the application of the plaintiff a rehearing was granted.

As the suit is one which could not, under the provisions of the act of Congress, twenty-eighth July, 1868, be transferred from the United States Provisional Court to the United States Circuit Court, being between citizens of this State, the plea cannot prevail, and it was therefore properly overruled by the judge *a quo*. In the answer the defendant denies all the allegations of the petition, and especially the ownership of plaintiff and the indorsement of the payee. An examination of the evidence in the record does not bring us to a different conclusion from the District Judge, who considered the authority of the agent to make the note and the indorsement of the payee sufficiently established.

Judgment affirmed.

No. 2172.—WIDOW J. C. DE ST. ROMES v. D. B. MACARTY.

To dispense with citation of appeal the motion must be made in open court at the same term of the court at which the judgment is rendered.

A PPEAL from the Fourth District Court for the parish of Orleans. *Theard, J. A. & M. Vaorhies*, for plaintiff and appellant, *Hornor & Benedict*, for defendant and appellee.

LUDELING, C. J. The motion to dismiss the appeal must be sustained. The judgment appealed from was rendered on the twenty-fifth January, 1868.

The order for an appeal was granted on motion in open court, on the twenty-third of January, 1869. There is no citation of appeal. It is only when the order for an appeal is granted on motion in open court at the same term of the court at which the judgment was rendered that such order dispenses with citation. Act of 1843, sec. 1, amending article 573 C. P. See acts of 1866, p. 160.

It is therefore ordered that the appeal be dismissed.

Rehearing refused.

Samuel Lee v. J. F. Goodrich, Tutor, et als.

No. 2045.—SAMUEL LEE v. J. F. GOODRICH, Tutor, et als.

Where a mandate has issued from the Supreme Court at the instance of one of the parties, to the clerk of the District Court, to amend his certificate so as to conform to the fact and show that all the evidence adduced on the trial is not contained in the record, and the clerk answers that he is not aware that other evidence than that embraced in the note of evidence and included in his certificate was offered, the appeal will not be dismissed. The appeal will not be dismissed for want of citation where the appellee appears and urges other grounds for dismissal before that of want of citation.

Where a debt has been contracted against an estate for supplies furnished, bills paid, etc., by the commission merchant, and a partition of the estate is afterward made among the forced heirs without providing for the debt, suit may be brought by the creditor against the heirs, jointly at the domicile of the succession. The allegation in the petition that some of the heirs named reside in other parishes than that where the suit is brought will not give rise to the exception of domicile.

APPEAL from the District Court parish of Tensas. *Hough, J. Farrar & Reeves*, for plaintiff and appellee. *Aroni, Leech & Lewis*, for defendants and appellants.

HOWELL, J. This case was submitted on the motion to dismiss, and the merits, with the plea of prescription, filed in this court. On the application of plaintiff's counsel a mandate was issued, under the provisions of articles 898 and 899 C. P., to the clerk of the lower court, to amend his certificate so as to conform to the fact and show that all the evidence adduced on the trial is not contained in the record. In answer to this order the clerk certifies that on the second trial of this cause, the attorneys of the defendants withdrew in open court, and declined acting further in the suit, and plaintiff alone was represented by counsel, who required no note of evidence to be taken, and that it is not within the clerk's knowledge that any more evidence was introduced than is contained in the transcript of appeal, and which comprises the documents introduced and the note of evidence taken at the first trial.

With this showing and the certificate affixed to the transcript before us, we are not authorized in concluding that all the evidence has not been brought up, and dismissing the appeal for such cause and the alleged want of a note of evidence. The informality of citing the attorneys of the appellee (the third ground of dismissal) is caused by the appellee's making appearance and urging other grounds for dismissal before that of a want of citation.

The motion to dismiss should be overruled.

Two of the defendants excepted to the jurisdiction of the court, being described in the petition and sued as residents of other parishes, after the partition of the succession against which the claim in suit originated. Such a suit is expressly authorized by the thirteenth section of the act of 1828, page 156, which we are not aware has been repealed. The exception was properly disregarded.

We are of opinion, however, that under the circumstances justice re-

Samuel Lee v. J. F. Goodrich, Tutor, et als.

quires the cause to be remanded to enable the parties to present their rights more satisfactorily, and offer evidence on the plea of prescription. It is evident that the defendants had not the aid of counsel on the trial below, and the judgment seems to be erroneous in including eight per cent. interest from March 23, 1861, to January, 1866, as part of the principal and legal interest on the total from the latter date. Conventional interest must be fixed *in writing*. C. C. 2895. The custom of merchants cannot change this law.

Interest upon interest cannot be recovered unless it be added to the principal, and *by another contract made a new debt*. No stipulation to that effect in the original contract is valid. C. C. 1931. The evidence does not enable us to regulate and allow the interest on the several and successive annual accounts according to these principles of law, admitting the correctness of the claim to be otherwise proven.

It is therefore ordered that the judgment appealed from be reversed, and this cause remanded to the lower court to be proceeded in according to law. Costs of appeal to be paid by plaintiff and appellee.

No. 1427.—ROBERT B. MITCHELL v. JOHN YOUNG et als., CATHERINE GLYNN.

Want of due diligence in making demand of the maker of a promissory note at maturity will discharge the endorser.

A promise by the endorser to pay the note, made in ignorance of his discharge, will not bind him.

A PPEAL from the Third District Court of New Orleans. *Fellows*, J. J. B. Cotton, for plaintiff and appellee. *E. O. Kelly*, for defendants and appellants.

HOWE, J. The defendant, Mrs. Glynn, has appealed from a judgment rendered against her as indorser of a promissory note made *in solido* by John Young and others.

Her defense is that due demand was not made of the makers at maturity, and that as indorser she is therefore discharged.

It appears that the makers were steamboat men, and that they were absent from New Orleans (where the note was dated and signed) at the time of its maturity. It is plain, however, that two of them had families and all places of residence in this city. One of them was the son-in-law of the appellant, and with his family resided at her house. The others lived in the neighborhood, and the residences of all might have been ascertained by inquiry of the indorser. From the fact that the notary served the notice of protest on the indorser personally, we infer that he might as readily have made inquiry of her as to the whereabouts of the makers—a demand from any one of whom would have been sufficient. 1 R. 119.

Robert B. Mitchell v. John Young et al., Catherine Glynn.

The notary in his certificate of protest states that he made search and diligent inquiry for the makers, but could not find them or any other person that would pay the note for their account. On being examined as a witness for plaintiff, however, he states:

"I made inquiry for the makers, and was informed that the makers were steamboat men. Do not remember who gave me this information. I found parties who said they knew the makers, and from them I learned that they were steamboat men. In protesting this note I used the same diligence I do in all cases. I infer that the parties of whom I made inquiry knew the makers, from the fact of their stating that they were steamboat men. I do not remember whether I called on the indorser or not previous to delivering notice of protest. * * * I protested the note at the request of Mr. Barker. He gave me no instructions. I did not know to whom the note belonged."

We think it clear that due diligence was not used in this case to find the makers of this note or some one of them, and make a demand of payment. 4 U. S. 186; 1 Parsons on Notes 459, and notes; 1 Gray 175; 6 Met. 290; 5 Duer 82.

It is urged by plaintiff that after protest the indorser repeatedly promised to pay the note. It does not appear, however, that this promise was made by her with knowledge that she had been discharged, and proof of such knowledge is indispensable to establish her liability. 13 L. 368; 1 Rob. 83; 17 L. 386; 7 R. 334; 5 A. 12.

We are of opinion that the liability of the indorser is not established by the record.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed as to the defendant, Catherine Glynn, and that there be judgment against the plaintiff as in case of non-suit, plaintiff to pay the costs in both courts.

No. 1111.—SUCCESSION OF G. EHRENBURG.

The formalities necessary to be observed to give validity to an olographic testament are, that the will must be written, dated and signed by the testator himself.

A party may dispose of his property by last will, by instituting an heir, or by naming legatees. Where the language of a testament leaves the meaning of the testator doubtful, acts done by him after its execution, may be taken into consideration as explanatory of, and in ascertaining his intentions. C. C. 1708.

A PPEAL from the Second District Court of New Orleans. *Thomas, J. Dalsheimer & Buck* and *Roselius & Philips*, for appellant. *M. C. Dunn*, for appellee.

LUDELING, C. J. Upon the decease of Gustave Ehrenberg, application was made to the Judge of the Second District Court of New Orleans to probate the following instrument as the last will and testament of said Ehrenberg, to wit:

"NEW ORLEANS, September 15, 1859.

"Mrs. Sophie Loper is my heiress.

"G. EHRENBURG."

"NEW ORLEANS, March 16, 1861.

"The legatee's name is correctly spelt Loper.

"G. EHRENBURG."

On the back of this instrument is written the following:

"Ehrenberg's will, to be opened by S. B. Patrick, who will see it executed. A copy of this will is left in the hands of the heiress."

The Judge refused to probate the act, on the ground that it was not a testament—that there was no disposition of property; that the language could not be regarded as an expression of his will that Mrs. Loper should inherit his property.

From this ruling an appeal has been taken. A testament is an act clothed with certain formalities, by which the last will of the testator is manifested, in relation to the disposition of his property, after his death. It is proved that this instrument is entirely written, dated and signed by G. Ehrenberg. It is, therefore, clothed with the formalities required by law for an olographic testament.

The Code declares that one may dispose of his property by will, "in any manner whatever, whether he has instituted an heir, or only named legatees." C. C. Art. 1563.

And we are directed by the Code that, "when, from the terms made use of by the testator, his intention cannot be ascertained, recourse must be had to all circumstances which may aid in the discovery of his intention." C. C. Art. 1703; 1 An. 444; 2 An. 580.

If, then, any doubt be entertained in regard to what the deceased intended by the terms "Mrs. Loper is my heiress," we are authorized to refer to his acts, in connection with this will, to learn the sense in which he used the words. More than a year after Ehrenberg made the will he wrote on the same sheet of paper, and below the will, "the legatee's name is correctly spelt Loper;" and on the back of the document is endorsed, in his handwriting, "Ehrenberg's will, to be opened by S. B. Patrick, who will see it executed. A copy of this will is left in the hands of the heiress."

It is certain that Ehrenberg intended to make a will, and that he intended that the act in question should be probated and executed as his testament. It seems to us equally certain that the desire, will, of Ehrenberg was, that Sophie Loper should have his property after his death, inherit it, that she should be his heir or universal legatee. The testator's intention is the object to be ascertained, and when learned beyond a reasonable doubt, it is the duty of courts to enforce it, if the dispositions be not reprobated by law. D. 33; L. 10; T. 7 l. 2 §; 7 An. 395; 4 La. 425; *Fuselier v. Masse et al.*

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the act in question be and is hereby declared to be the testament of G. Ehrenberg; and that, as such, it be executed, after the formalities required by law shall have been complied with; and that, for this purpose, the case be remanded to the District Court. It is further ordered that the succession pay the costs of this appeal.

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No. 2166.—ISAAC MISNER v. HEIRS OF D. FULSHIRE et al.

At a probate sale of real estate belonging in part to minor heirs by and with the advice and authorization of a family meeting, approved by the under tutor, the purchaser is bound to pay the price bid. The omission to make the major heirs parties to the proceedings for the order of sale is cured by their failing to make objection before the sale.

APPEAL from the Fifth District Court, parish of East Baton Rouge. *Posey, J. White & Robertson*, for plaintiff and appellant. *Staford & Buckner* and *Joseph Joor*, for defendants and appellees.

WYLY, J. Plaintiff sues to recover the price paid by him to the sheriff of East Baton Rouge for a tract of land adjudicated to him at the succession sale of Mrs. Domatilde Fulshire, deceased, on account of alleged defects in the title, and he enjoins the sheriff from paying over the proceeds of said sale to be partitioned among the heirs.

He urges various irregularities in the proceedings of the family meeting, and in the order of sale, as calculated to impair the title and relieve him from his obligations under the adjudication.

The defendants contend that the plaintiff has complied with the terms of adjudication by paying to the sheriff the price, but refused to accept the deed and receive possession of the land which they tendered him. They deny that there are any defects in the proceedings which invalidate the title of plaintiff; that the tutor cannot complain because the sale was ordered on his own petition; that the order for the sale of the minors' interest in said land was regularly decreed upon the advice of a family meeting with the approval of the under tutor; that the major heirs, who were not made parties to the sale, cannot contest its validity, because by applying for the partition of the proceeds of said sale and by appearing in this suit to resist the demand of plaintiff, they virtually ratify the sale and are estopped from setting up any adverse claim to said property.

The district judge investigated the case very fully and gave judgment for defendants. We think the evidence sustains his judgment.

The payment of the price and the adjudication completed the contract of sale and the informalities preceding the sale were susceptible of remedy by ratification. The major heirs should have been made parties to the sale, but, in our opinion, they have waived their right to attack it by claiming the price of the purchase.

Isaac Misner v. Heirs of D. Fulahire et al.

Plaintiff relies upon the decision in the matter of the succession of J. G. Weber, 16 A. 420. In that case the property was offered for sale at the instance of the tutor of the minor heirs, by an order of the probate court, *without the advice of a family meeting*, and the court held that there was a radical defect in the title and the purchaser properly refused to pay the price.

In the case we are considering, the order for the sale was based upon the advice of a family meeting duly convened by the tutor, approved by the under tutor, and the adjudication was made in pursuance of the order of sale thus granted.

The authorities cited by plaintiff do not sustain his demand.

It is therefore ordered that the judgment appealed from be affirmed with costs.

NO. 1520.—JOSEPH KELLER v. JOSEPH A. RUIZ AND WIFE.

A married woman may bind her separate estate for the debts of her husband by complying with the provisions of the act of the Legislature of 1855, approved March 14, No. 200, entitled "An Act to enable married women to contract debts and bind their paraphernal or dotal property."

A PPEAL from the Sixth District Court, of New Orleans. *Duplantier J. Jerome Meunier*, for plaintiff and appellee. *T. A. Bartlette*, for defendants and appellants.

TALIAFERRO, J. The plaintiff, as owner and holder of a promissory note for twenty-five hundred dollars, executed by the defendants and secured by mortgage, proceeded *via executiva* to collect it. An order of seizure and sale of the mortgaged property was rendered, and from this order the defendants have taken a suspensive appeal. The note is in these words :

"\$2500.

NEW ORLEANS, September 21, 1866.

"One year after date we promise to pay to the order of ourselves two thousand five hundred dollars, value received, with interest at the rate of eight per cent. per annum from date until paid.

(Signed)

"J. A. RUIZ.

"FANNIE RUIZ."

JOHN RUIZ."

"To authorize my wife. (signed)

Endorsed—signed—"J. A. Ruiz—Fannie Ruiz."

"To authorize my wife. (signed)

JOHN RUIZ."

The note has across its face the notary's paraph *ne varietur* with concurrent date.

The defense is placed mainly upon the ground of the incapacity of a married woman to bind herself for her husband's debts, and reference is made to article 2412 C. C., and to numerous authorities. We find from the record that in this case the wife has availed herself of the benefit of the second section of the act of 1855, removing, under certain conditions, the disabilities expressed in the several articles of

Joseph Keller v. Joseph A. Ruiz and Wife.

the Code and the decisions relied upon in the defense. We conclude therefore that in the present case, Mrs. Ruiz is bound by the obligation for the enforcement of which the order of seizure was obtained.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed; that this appeal be dismissed at the cost of the appellants, and that the plaintiff and appellee be authorized to proceed under the order of seizure and sale, according to law

Rehearing refused.

No. 1440.—NOBLE & KAISER v. J. L. WARNER.

Where a steamboat is sequestered in a suit against the owners, and released on their giving a bond conditioned that they will not make any improper use of the property, and that they will faithfully present it after definitive judgment, the judgment creditor, after a final judgment has been rendered against the boat and owners, may proceed directly on the bond without observing the formalities of issuing execution against the owners and having it returned *nulla bona*.

APPEAL from the Sixth District Court of New Orleans. *Duplantier, J. B. Egan*, for plaintiffs and appellees, *Emerson & Grow*, for defendant and appellant.

TALLAFERRO, J. Noble & Kaiser in June, 1861, brought suit against Wm. Buchanan and J. R. Shannon as owners of the steamboat *Burton* for \$434.38, with five per cent. interest from judicial demand, and sequestered the boat, claiming a lien and privilege upon it for supplies furnished. They obtained judgment in February following in conformity with the prayer of the petition. On the seventeenth of June, 1861, soon after the seizure of the boat, Buchanan, the only ostensible owner of the boat released the sequestration by giving bond as required by law in such cases, and Warner, the defendant in this suit became his surety on the bond. The present suit is against Warner upon this bond of release. The plaintiffs claim in this suit the amount of their judgment in the suit against Buchanan and others v. owners of the steamer *Burton*, and in addition the sum of \$159.45 costs of suit, with legal interest on that amount from fifteenth of February, 1862. The plaintiffs had judgment as prayed for and the defendant has appealed.

The defendant filed exceptions to the proceedings as premature, alledging that the writ of *fiери facias* referred to in the petition was returned before the expiration thereof and that the requisite legal formalities had not been observed. The exceptions were cumulated with the answer.

The chief ground of defense is that prior to the issuing of the *fiери facias* the steamboat in the spring of 1862, was seized and taken possession of by the Confederate forces against the consent, protest and remonstrances of the defendant. That said boat was kept in the possession of those forces until about the twenty-sixth day of April, 1862,

Noble & Kaiser v. J. L. Warner.

when she was captured by the Federal forces and by them kept against the will and protest of the defendant until she was sunk, destroyed and totally lost prior to the issuing of the writ of *feri facias*. The defendant further set out that the owner of the boat is prosecuting a claim against the United States for the value of the boat, and that he has tendered the plaintiffs a conveyance of so much of said claim as will fully pay the plaintiffs' debt, interest and costs, which offer and tender they have refused.

The defendant argues that as a condition precedent to recovery from the surety in this case it must be shown that an execution issued and was regularly returned *nulla bona*, and contends that the return was prematurely made. We find no *feri facias* in the transcript. The record in part is somewhat meagre and unsatisfactory. It sufficiently appears, however, that an execution was issued. The judgment in favor of plaintiffs against the "Burton" and owners was rendered on the fifth of February, 1862, an appeal was taken and a decree rendered by this court on the nineteenth of June, 1865, confirming the judgment of the lower court. See 20 An. p. 121. There is nothing to show whether the appeal was suspensive or devolutive. If suspensive, it was out of the power of plaintiffs to proceed with an execution before the seizure of the boat by the military authorities; and to issue it after the final judgment on appeal, would have been a vain and useless thing so far as relates to the boat, which long before had been destroyed. But the plaintiffs charge that the defendant after releasing the steamer from the sequestration sold her, and that the boat was not taken from the possession of defendant by the Confederate authorities and against their will. The defendant replies to this that the sale was made to a co-owner, and that the sale made no change adverse to plaintiffs' right. It seems that the original suit was brought against Buchanan and Shannon. In that case Shannon filed a general denial and made no defense whatever as owner or otherwise, and it is abundantly shown that he was not a co-owner of the boat at the time she was sequestered, but only the agent of the boat. Shannon testified in this case at great length. He says, "the boat stood in the name of William Buchanan at the time of the seizure by the plaintiffs in this suit. He was then the owner of the boat. I purchased from him about five months previous to Buchanan's death, which occurred in April, 1862. James D. Dunbar was a co-owner with Buchanan at the time of the seizure in this suit (Noble & Kaiser v. the steamer Burton and owners). I was not interested in the boat at the time of the seizure of Noble & Kaiser; I was however the agent of the boat and I was furnishing her with supplies."

It is fully made out by the evidence of Shannon and Biossat that the steamer was seized by the Confederate authorities in April, 1862, when Shannon was the sole owner, having purchased her after the execution

of the bond releasing the sequestration. The defendant had by the act of selling the boat put it out of his own power to comply with the condition of the bond which bound him to produce the boat when required, to be made subject to the payment of the plaintiffs' judgment. The boat was seized by the Confederate authorities while under the control of Shannon, the then owner, and the defendant's plea of overpowering force, if available under a different state of facts, falls to the ground. This court has, in several cases presenting analogous conditions, determined that the remedy was directly on the bond. The condition of the bond that "the defendant should not make an improper use of the property, and that he shall faithfully present it after the definitive judgment," was clearly forfeited and the plaintiffs were at liberty to proceed at once upon their bond without being compelled to pursue more dilatory and circuitous measures.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts. See 1 An. 122; 10 An. 284; 4 An. 372; 7 An. 110; 9 An. 422; 9 Rob. 535; 2 An. 188.

No. 826.—H. W. LIVINGSTON v. BESSIE E. GAUSSEN, Administratrix.

An executor or administrator cannot bind the estate he represents by making or indorsing a promissory note in that capacity, but he will be held personally responsible for the amount, and the holder is not bound to allege or prove that the executor exceeded his powers in order to hold him personally responsible on the note.

The holder of negotiable paper made or indorsed by a party *as executor*, may institute his action against such party individually, leaving to the latter the right to show that he is not personally responsible.

APPEAL from the Second District Court of New Orleans. *Thomas, J. C. M. Conrad & Sons*, for plaintiff and appellant, *Roselius & Philips*, for defendant and appellee.

HOWELL, J. This suit is brought against the legal representative of J. K. Elgee on a note made by him as "executor of the estate of Kelso," to the order of and endorsed by W. & D. Urquhart.

The defendant pleaded the peremptory exception that no cause of action is set out against Elgee individually, as he signed said note in his fiduciary capacity, and plaintiff could only sue the estate of Kelso.

In support of this exception, which was maintained by the judge *a quo*, defendant's counsel quote the cases of *Gillet v. Heirs of Rachal*, 9 R. 276, and *Bank of Louisiana v. Dejean*, 12 R. 16.

In these cases the representatives of the successions were declared not to be personally liable on notes signed by them in their fiduciary capacity, because, *in defense*, it was shown that they had not bound themselves individually, but had, to the knowledge of the plaintiff, simply given acknowledgments, in the form of notes, of debts existing at the opening of the successions represented by them. In each of the

H. W. Livingston v. Bessie E. Gausson, Administratrix.

cases the general doctrine was distinctly recognized, "that an executor or other administrator, by making or indorsing a note in that capacity, cannot thereby bind the estate, but will make himself responsible for its amount," that he "cannot, in any transaction in which he pretends to act as such, create any liability on the estate, or change the nature of its obligations, or increase its responsibility with regard to its outstanding debts, and if he do so, he will be personally bound." This is the well settled doctrine in our jurisprudence on this subject. See 8 N. S. 451; 2 L. 185; 1 R. 119; 17 A. 17. And the question is, must the holder of a note made by an executor allege that the latter exceeded his powers and functions, in order to maintain an action against him personally?

We think not. The powers of executors and administrators are conferred by law, and among them is not the power to make and indorse notes. When therefore they assume or exercise such a power, the presumption of law is against them, and the burden is on them to plead and show in defense that they are not individually liable. In the case of *Russell & Barstow v. Cash et al.*, 2. L. 185, which was a suit on a draft drawn by the defendant Cash as "executor of Moses Kirkland, deceased," the charge of the District Judge to the jury, "that the allegations of the petition would not support an action against the executor in his individual capacity; he must be charged with having improperly and falsely described himself as executor after his functions had ceased," was not sustained, and the court said, "the executor having no authority to bind the estate by drafts, bills of exchange or notes, the suit against him as representative of the estate cannot be maintained. * * * The defendant is however responsible on the draft given, in his private capacity. The words, 'executor of Moses Kirkland,' added to his signature, can be considered in no other light but as words of description, which neither add to, nor diminish the individual and personal responsibility of the party using them," and judgment was rendered against Cash individually, although he was sued only in his representative capacity.

In *Flower et al. v. Swift*, 8 N. S. 451, it said, "as the executor cannot bind the estate by indorsement, it follows, that the liability resulting from those he makes, is personal."

Mr. Parsons in his work on Notes and Bills, vol. 1, p. 161, maintains the same doctrine and says: "If an administrator or executor make, indorse or accept negotiable paper, he will be personally liable, even if he adds to his own name the name of his office, signing a note, for example, 'A, as executor of B;' for this will be deemed only a part of his description, or will be rejected as surplusage."

Wherever, therefore, negotiable paper is made or indorsed by a party as executor, the holder is not bound to consider it a mere acknowledgment of a debt of the estate, and required to wait for payment in the

H. W. Livingston v. Beaulieu E. Goussier, Administratrix.

ordinary course of administration; but he may institute his action against such party individually, leaving to the latter the right under certain circumstances to set up a defense that he is not personally responsible.

It is therefore ordered that the judgment appealed from be reversed, the exception of the defendant overruled, and this cause remanded to be proceeded in according to law. Costs of appeal to be paid by defendant and appellee.

No. 2014.—ANDREW H. GAY v. A. P. MARRIONNEAUX et als.

Where an appeal has been dismissed on the ground that all the parties interested in the judgment were not made parties to the appeal, and the same questions involved in the first judgment appealed from are again passed upon before the District Court, between the same parties in a judgment of homologation, and more than one year having elapsed from the rendition of the first judgment, it must be considered *res judicata* from which no appeal will lie.

APPEAL from the Fifth District Court, parish of Iberville. *Posey, J.* *Barrow & Pope*, for plaintiff and appellee. *Talbot & Petit* and *Samuel Mathews*, for defendants and appellants.

LUDELING, C. J. This is a suit to partition certain property held in common by the plaintiff and the defendants. A sale of the property was ordered by the District Court to effect the partition. Gay had been in possession of the property before the sale, and he presented to the notary, who had been appointed to make the partition, a claim against the joint owners, amounting to ten thousand three hundred and sixty dollars, for improvements placed on the plantation at his own cost.

Opposition to this claim having been made by some of the joint owners, the matter was referred to the judge by the notary.

The court gave judgment in favor of Gay for the amount claimed, but charged him thirteen hundred and five dollars for the use of the plantation, and referred the case back to the notary in order that the partition might be completed. This judgment was rendered on the fifteenth day of May, 1867; an appeal was taken from the judgment, and this court dismissed the appeal on the ground that all the parties interested in the judgment had not been made parties to the appeal. Subsequently, on the seventeenth of July, 1868, this appeal was taken from the judgment homologating the partition. The only complaint made by the appellants is, that the amount allowed to Gay for improvements is incorrect. This is the same thing which was decided in the judgment of the District Court on the fifteenth of May, 1867, and the parties are the same. More than one year having elapsed since the rendition of that judgment the plea of *res judicata*, interposed by the plaintiff, must be sustained. 11 La. 497; 8 Rob. 195; 12 Rab. 319; 7 An. 530; C. C. 1270; C. P. arts. 589, 567.

It is therefore ordered that the appeal be dismissed at the costs of the appellants.

Rehearing refused.

Stephen S. Fish v. T. W. Collens.

No. 1948.—STEPHEN S. FISH v. T. W. COLLENS.

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In a suit where the right of office is involved, the appeal will not be dismissed where the failure to file the record within the time prescribed by law is not imputable to the appellant. Sec. 12, acts of 1864, page 22.

In a controversy for an office the salary of which is fixed by law, it is not necessary to aver or prove that the amount is above five hundred dollars to give the Supreme Court jurisdiction.

The election of a party to an office does not depend upon the ineligibility of his competitor but upon the will of a majority or plurality of the legal voters of the district.

A PPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. E. Filleul*, for plaintiff and appellant, *E. Howard McCaleb* and *E. Bermades*, for defendant and appellee.

HOWELL, J. This is a contested election case, in which the plaintiff has appealed from a judgment dismissing his action on exceptions pleaded by the defendant, who has, in this court, moved to dismiss the appeal on the grounds:

"*First*.—Because this is a case in which the right to an office is involved and the appeal herein taken from the judgment of the District Court was not made returnable to this court, nor was the transcript filed within the delay required by law.

"*Second*.—Because there is no allegation nor evidence sufficient to give this court jurisdiction *ratione materiae* over this cause, and to show that the amount in dispute exceeds five hundred dollars."

1. On the first ground it is contended that the appeal should, by the act of 1864, § 9, p. 20, have been made returnable, and the transcript filed within ten days after the judgment of the lower court.

The judgment was signed on the ninth of November, 1868, the motion for appeal made on the sixteenth of the same month, the appeal made returnable on the second Monday (fourteenth day) of December following, the transcript completed on the eighth and filed on the fifteenth of the same month. Under these circumstances we cannot say that the irregularity is imputable to the appellant and he is consequently protected by the twelfth section of said act. He complied with the order of the judge *a quo*, whose duty it was to name the return day in accordance with the law, and there is nothing to show that the appellant sought or obtained any advantage by delay. 10 A. 493, 778. See also acts 1866, p. 154; §§ 13, 16.

2. As the contest is for the office of District Judge, the salary of which is fixed by law, we cannot see the absolute necessity of alleging or proving the amount involved. We know as well from the statute, as we would from an allegation or proof in the record, that the matter in dispute pecuniarily exceeds five hundred dollars. The election contested was, by the constitution, for judges who are to hold office for a term of four years. Arts. 84 and 154. The act No. 99 (acts of 1868) fixes the salary of the District Judges at \$5000 per annum.

It is therefore ordered that the motion to dismiss be overruled with costs.

 Stephen S. Fish v. T. W. Collens.

ON THE MERITS.

LUDELING, C. J. The petitioner alleges that he was a candidate for election to the office of Judge of the Seventh District Court of the parish of Orleans, on the seventeenth and eighteenth days of April, 1868; that the defendant and Thomas J. Earhart were also candidates for the same office; and that the defendant claims to have been elected to said office.

Petitioner avers that defendant is, and he was at the date of the election, ineligible to said office. The plaintiff further avers, that *he received the largest number of votes of any candidate eligible to the office.*

The prayer of the petitioner is, that T. W. Collens be declared ineligible to the office, and that the petitioner be declared duly elected Judge of the Seventh District Court of the parish of Orleans.

The defendant filed exceptions embracing many reasons why, he alleges, the suit should be dismissed. It will be necessary to examine only one of the grounds stated in the exceptions filed by defendant.

It is that the petition states no cause of action. We think the exception well taken. *Staes v. Gastinel*, 20 An. 114 and 20 An. 489.

The plaintiff does not allege that he received a larger number of the votes cast at the election than either of his competitors; but on the contrary, he admits that the defendant received a greater number of votes than he did. The election of the plaintiff did not depend upon the ineligibility of his competitors to the office, but on the will of a majority or plurality of the legal voters of the district, expressed at the ballot box. It is unnecessary in this case to express any opinion as to whether the votes cast for a person, who is notoriously known to be ineligible, should be rejected or not, as no such allegations are made in this petition.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, and that appellant pay the costs of appeal.

 No. 2102.—STATE OF LOUISIANA v. WATKINS AND NELSON.

In criminal cases the Supreme Court has jurisdiction on questions of law only. Constitution, article 74. Questions of continuance, and the grounds of the motion to quash, depending solely on facts, cannot be examined on appeal.

A PPEAL from the District Court, parish of St Helena. *Ellis, J. Bolivar Edwards*, District Attorney, for the State, *C. J. Bradley*, for defendants and appellants.

HOWELL, J. On the eighteenth day of May, 1868, the defendants Brandon Watkins and Peter Nelson were indicted by a grand jury in the parish of Livingston, for murder. In October following, a change of venue to the parish of St. Helena was obtained, where, on the twelfth of November, same year, a *nolle prosequi* was entered as to Peter Nelson, and a motion was made by Watkins, the other defendant,

to quash the indictment on the ground that Darlin B. Cason, Perry Watts and other members of the grand jury who found the true bill, were incompetent jurors under the acts of Congress, known as the reconstruction laws, because they were not registered as voters of the parish of Livingston, which motion was accompanied by the affidavit of the accused for a continuance, to procure evidence to support and prove the allegations of the motion, the grounds for continuance being that he had just discovered that the said jurors were not registered as voters at the date of the said finding, and he had not had time to procure the evidence of their incompetency, which existed in the records of the parish of Livingston, and the said records could be obtained by the sixteenth of the month, four days. This motion was overruled, a bill of exceptions reserved and the trial resulted in a verdict of guilty, without capital punishment, upon which judgment was rendered, and two days thereafter sentence was pronounced, whereupon this appeal was taken.

The question of continuance as presented in the bill of exceptions and the grounds of the motion to quash, depend on facts of which we have no jurisdiction; and our attention is not called to, nor do we see any error on the face of the record.

Judgment affirmed.

No. 1885.—Widow DE ST. ROMES v. LEVEE STEAM COTTON PRESS.

Where A garnisheed on execution against B, a claim for which B is suing C, notice to B of the seizure is not necessary. The law only requires that notice of the seizure should have been given to C.

A PPEAL from the Fifth District Court of New Orleans. *Léaumont, J. E. Filleul*, for plaintiff and appellant. *A. & M. Voorhies* and *E. Bermudez*, for defendants and appellees.

HOWELL, J. This is an appeal from a judgment on a rule in the Fifth District Court of New Orleans taken in this case, with which a rule in the Fourth District Court in the case of *Judson and Montross v. Mrs. de St. Romes* was cumulated.

The question presented is, whether or not the claim of plaintiff, Mrs. de St. Romes, in her suit against the cotton press in the Fifth District Court, was legally seized in the suit of *Judson and Montross, H. Samory, subrogated v. Mrs. de St. Romes*, in the Fourth District Court, before she transferred it to Eugene de St. Romes, the appellee.

Notice of the transfer and subrogation by Mrs. de St. Romes to Eugene de St. Romes, her son, was not served on the Levee Steam Cotton Press until the ninth June, 1868, the day after her judgment against the cotton press, rendered on the thirteenth January, 1868, became final in the Supreme Court, and the day before it was filed in the lower court.

On the fifteenth January preceding (1868), H. Samory, subrogated, issued execution against Mrs. de St. Rome in the suit of Judson and Montross against her in the Fourth District Court, and propounded interrogatories to the Levee Steam Cotton Press, which, with the petition and citation were served personally on the president thereof on the next day (January 16, 1868).

On the twenty-third of the same month the press, through its president, answered that it had sufficient funds of Mrs. de St. Rome in its hands to satisfy the judgment in favor of Judson and Montross, as to which they were interrogated, should the judgment rendered by the Supreme Court in her favor against the said press acquire the form of *res judicata*.

Notice of the transfer and subrogation by Judson and Montross of their judgment against Mrs. de St. Rome to H. Samory, issued on the fifteenth January, 1868, was served on Mrs. de St. Rome on the eighteenth of the same month.

According to the terms of the act of the twentieth March, 1839, and the decisions in *Hanna v. Bry*, 5 A. 656, and *Walker v. Creevy*, 6 A. 535, the seizure in the garnishment proceedings was effectual before the transfer from Mrs. de St. Rome to Eugene de St. Rome. The execution issued on the judgment against Mrs. de St. Rome; her rights were seized in the hands of the cotton press, to which interrogatories were propounded; its answers as garnishee were received; the execution remained in the hands of the Sheriff, and when the judgment against the press became final a rule was taken on it to pay. In such a case notice to Mrs. de St. Rome of the seizure in the hands of the press was not essential.

The transfer by Mrs. de St. Rome to Eugene de St. Rome not having been notified to the press, the debtor, until the ninth June, 1868, was not binding on Samory, the creditor of the transferee. C. C. 2613.

It is therefore ordered that the judgment appealed from be reversed, and that the rule taken by H. Samory on the Levee Steam Cotton Press be made absolute, and that the Sheriff pay to H. Samory, subrogated, the amount of the judgment in the case of Judson and Montross, H. Samory subrogated, v. Mrs. de St. Rome, as deposited by the Levee Steam Cotton Press by order of the lower court.

Costs of this proceeding in both courts to be paid by the appellees. Rehearing refused.

John Offutt v. W. W. Chapman and John McKowen, Same v. John McKowen.

No. 2112.—JOHN OFFUTT v. W. W. CHAPMAN and JOHN MCKOWEN.
Same v. JOHN MCKOWEN.

21	203
121	688
121	689

The burden of showing a renunciation of prescription of a promissory note after it has accrued ~~rests upon the holder.~~

An attachment of a payment on the note after it is prescribed is not sufficient to interrupt prescription.

The parol testimony of the holder of a promissory note is not admissible to establish the interruption of prescription; written proof alone is admissible to establish the interruption. Acts of 1858, No. 203, sec. 4.

A PPEAL from the Fifth Judicial District Court, parish of East Feliciana. *Posey, J. Kerman & Lyons*, for plaintiff and appellant. *Cross & Hardce*, for defendants and appellees.

HOWE, J. These suits were consolidated in the court below. The plaintiff has appealed from a judgment dismissing his claims in both cases.

The first of the suits is brought on the following obligation:

"\$1600. Received, Clinton, La., July 14, 1860, of John Offutt, one thousand six hundred dollars, payable on demand.

"W. W. CHAPMAN & CO.

"per L. G. CHAPMAN."

(Indorsed)

"Received of the within one hundred dollars. January 10, 1866.

"JOHN OFFUTT."

This is a promissory note. *Parsons on Notes*, vol. 1, pp. 23 24, and cases cited.

The second suit is brought to recover the sum of \$500 which plaintiff avers to be due from W. W. Chapman & Co. for "money loaned," the defendant, McKowen, being sued as a partner in that commercial firm.

Citations were served in the cases respectively January 12, 1867, and May 8, 1867, and among other defenses the prescriptions of three and five years have been pleaded.

It appears by a comparison of the dates above given that both claims are prescribed. The note had been prescribed upward of five months when the alleged payment was made on account, and the memorandum indorsed on it by plaintiff. The plaintiff was bound, therefore, as to that note, to establish a *renunciation* of prescription, and of this there is no legal evidence. Such renunciation can only be established by written evidence. Laws of 1858, No. 203, § 4.

It will not be seriously contended that the plaintiff can make such evidence for himself by simply writing upon the instrument the receipt which appears to be indorsed upon it. Nor can the parol testimony of plaintiff on the record be permitted to establish a renunciation. The statute of 1858 is positive in requiring the written proof.

The claim for money loaned was prescribed by the lapse of three years. C. C. 3503.

For the reasons given it is ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 2075.—N. K. KNOX v. A. DUPLANTIER et als.

21 294
117 845

Where more than one year has elapsed from the date of the judgment of the court *a qua* before the judgment of the Supreme Court is rendered dismissing the appeal, the appellant will not be entitled to a second appeal, the time having expired within which he could appeal. C. P. 593.

APPEAL from the District Court, parish of East Baton Rouge. Posey, J. A. S. Herron, for plaintiff and appellee, Favrot & Lamon, for defendants and appellants.

HOWELL, J. A motion is made to dismiss this appeal on the ground that more than one year has elapsed between the date of the rendition of the judgment and that of the order of appeal.

The judgment was rendered and signed on the first day of December, 1866. On the same day an order of appeal in the alternative was granted, returnable according to law. On the eleventh of January, 1867, a bond for a devolutive appeal was filed below, and on the twenty-sixth of February following the transcript was filed in this court. A motion to dismiss was made and submitted, with the case on its merits, on the sixth March, 1867. This motion was not disposed of until the eleventh May, 1868, when the appeal was dismissed for a cause attributable to the appellant. An application for a rehearing was made on twenty-fifth May and refused on twenty-second June, 1868. On the fourteenth July following (1868), the appellants obtained another appeal, returnable on the fourth Monday of February, 1869, and the transcript was filed here on twenty-third day of said month, when the present motion was made.

Rehearing refused.

The appellant admits that the general tenor of decisions is in favor of a strict interpretation of article 593 C. P., which declares that no appeal will lie after a year has elapsed, to be computed as to residents, from the day on which the final judgment was rendered; but he contends that this case presents the strongest claims in favor of a deviation from the general rule of law, in the fact that he was deprived by the delay (after the motion was submitted) in the appellate court of the opportunity of claiming a second appeal within the year.

We might, possibly, be unable to resist the equitable force of this position if we were vested with any discretion in the matter, and appellants were wholly without fault. They exercised their constitutional right of appeal in due time, but by their own *laches* it proved to be ineffectual, and, as said in 3 R. 115, and 17 A. 238, we know of no law that recognizes an interruption or prolongation of the delay fixed by article 593 C. P. The right to an appeal in certain cases is an absolute right, but when once exercised its second exercise is contingent.

To admit that the time, during which the appellate court holds a motion to dismiss under advisement, will have the effect contended for,

N. K. Knox v. A. Duplantier et als.

will necessitate the admission that any other delay, not caused by the appellant, will have the same effect, and the adjournment of the court, the crowded condition of the docket and the like will be causes for setting aside a positive provision of law. We deem it our duty to adhere to the law, whatever may be the hardship in particular cases.

Appeal dismissed.

No. 1467.—J. ARROWSMITH v. E. H. DURELL, MRS. DE PONTALBA, subrogated.

21	295
122	776

A devolutive appeal from a final judgment does not suspend or interrupt prescription pending the appeal. Acts of 1853, p. 250.

Where a law is clear and free from all ambiguity the letter of it must not be disregarded under the pretense of pursuing its spirit. C. C. 13.

The citation required by the act of 1853, page 250, in that the judgment may be revived before it is prescribed, refers to the judgment rendered by the District Court, and not that of the Supreme Court.

A PPEAL from the Fourth District Court of New Orleans. *Theard, J. P. Soulé, L. Charet and James Walker*, for plaintiff and appellee. *Johnson, Dennis, Legendre & Berault*, for defendant and appellant.

HOWELL, J. The only question presented for our decision is, whether or not a devolutive appeal suspends or interrupts the prescription of a judgment under the act of 1853, p. 250.

By the letter of the statute, the question must be answered in the negative. It provides that: "Hereafter all judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of said judgment; provided, however, that any party interested in any judgment may have the same revived at any time before it is prescribed by having a citation issued according to law to the defendant or his representative from the court which rendered the judgment, unless the defendant shows good cause why the judgment should not be revived."

The appellant, Mrs. De Pontalba, subrogated to the judgment against the plaintiff, contends that the ten years only commenced running on the date of the rendition of the judgment by the Supreme Court, affirming the judgment of the lower court, on the devolutive appeal, which was pending about four years. She bases her conclusion on the theory that the word judgment in the statute is used "in its largest sense of a final judgment, a judgment putting an end to all further contestation between the parties, and having the force of the thing adjudged, which is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on appeal." C. C. 3522, sec. 9. And she suggests the anomalous consequence of a judgment becoming extinguished by prescription before a final determination of the rights of the litigating parties has been reached in the appellate court and the whole subject matter vanishing into thin air and leaving not a

J. Arrowsmith v. E. H. Darrell, Mrs. De Pontalba, subrogated.

trace behind. She further urges that the doctrine of all the prescriptions *liberandi causa* rests on a presumption of payment arising out of the silence of the creditor during the appointed time (C. C. 3422, 3494), and that such presumption and silence cannot be said to exist while an appeal is undetermined.

In reply to all this, however forcible it may appear, we have only to say that when a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit, C. C. 13, unless possibly following the letter may lead to an absurdity. The consequences suggested by appellant as possible, do not appear to us any more absurd than the assumption that a moneyed judgment will be permitted to remain for ten years unexecuted below, or undetermined in the appellate court.

The statute before us is, in itself, free from ambiguity. It says plainly that all judgments for money shall be prescribed by the lapse of ten years from the rendition thereof, unless revived before they are prescribed by having citation issued from the court which rendered them. Such citations cannot be issued from the Supreme Court, and consequently the statute does not refer to the rendition of the judgment by the Supreme Court, but manifestly to that of the court of the first instance. It does not say ten years from the *finality* of such judgment, but from its rendition, which in this instance was more than ten years prior to the issuing of the execution, and as the judgment had not been revived in the mode provided by the statute it was prescribed. It is not pretended that the judgment might not have been revived after its appearance on appeal and before the expiration of the ten years from its rendition in the lower court.

Judgment affirmed.

NO. 1512.—WILLIAM GOGREVE v. JOHN WINDHORST.—WILLIAM SCHROEDER, third opponent.

Where the value of a schooner, the ownership of which is in dispute, is shown to be above five hundred dollars by the amount of the bond for injunction, and the amount of the appeal bond, the appeal will not be dismissed for want of jurisdiction. Constitution, art. 74.
In a dispute about the ownership of a schooner, the opinion of the Judge *a quo* on the questions of fact is entitled to great weight when sustained by the testimony offered and in the record, without objection from the opposing party.

A PPEAL from Second District Court, parish of Jefferson. *Cazabat, J. Saucier & Michinard*, for plaintiff and appellant. *J. Hawkins*, for third opponent, appellee.

HOWELL, J. A motion is made to dismiss this appeal on the ground that there is nothing in the record showing that the matter in dispute exceeds five hundred dollars.

By reference to the record we find that, in obtaining an injunction against the sale of the schooner claimed by him, the third opponent gave a bond for \$1200; that afterwards he had said schooner released on giving a bond for \$1000; that about the time of the seizure one of

William Gogreve v. John Windhorst.—William Schroeder, third opponent.

the witnesses offered the defendant \$1000 for it; and that it was then estimated by the defendant at \$2000. The appeal bond given by the plaintiff and appellant is for \$1000.

From these facts and figures we think it abundantly shown that the matter in dispute (the schooner) exceeds five hundred dollars in value.

It is therefore ordered that the motion to dismiss be overruled with costs.

ON THE MERITS.

HOWE, J. The plaintiff in this case having, on the sixteenth November, 1866, obtained a judgment against the defendant, caused a writ of *feri facias* to be issued thereon, under which the sheriff seized, as property of defendant, the schooner Matilda.

On the twelfth December, 1866, William Schroeder, third opponent, enjoined the sale, claiming to be the sole owner of the schooner by purchase from the defendant in March, 1866.

The plaintiff, in answer to the opposition, alleged that the sale from Windhorst to Schroeder, if any there was, was simulated.

Upon the trial of this issue, the third opponent established the reality of the sale to the satisfaction of the Judge *a quo*, and the opposition was maintained and the injunction perpetuated. No objection was made to the testimony adduced by the opponent, and it seems to sustain the judgment; and, in a case like this, the opinion of the Judge before whom the cause was tried is entitled to great weight. 6 La. 31; 10 A. 92; 561; 14 A. 224.

It is therefore ordered and adjudged that the judgment from which the plaintiff has appealed be affirmed with costs.

Rehearing refused.

No. 4455.—SUCCESSION OF JOSEPH H. JOHNSON.

In homologating a tableau of distribution the judge can only order the executor to distribute the funds in his hands. He cannot order him to pay a particular fund to a creditor which he has previously ordered to be paid to another.

The executor cannot be punished for contempt, in not paying a particular fund, when he has paid that fund to another creditor under the order of the Court.

APPEAL from the Second District Court of New Orleans. *Thomas, J. Elmore & King*, for appellant. *Hornor & Benedict*, for appellee.

WYLY, J. This appeal is taken by Charles E. Alter, a mortgage creditor of the succession of Joseph H. Johnson, from a judgment on a rule ordering the dative executor to pay over to him certain funds in his hands.

This rule was taken on the executor, Crane, to show cause why he should not be imprisoned for contempt for not paying over the funds he was ordered to pay to said Alter by the last tableau homologated.

On the trial, the rule was made absolute, and the executor was required within three days to pay to Alter the balance of the funds on hand, say \$674 28, less the costs due the clerk, which was accordingly done.

Alter contends that the executor was required to pay him a larger sum, to wit: \$11,000, by the judgment homologating the tableau; and that the Judge *a quo* erred in determining the rule, by not requiring the executor to pay him the full amount mentioned in the tableau.

It appears that the \$11,000 mentioned in the tableau was derived from the sale of the property styled the "batture property," which was purchased by W. H. Aymar; that his titles were subsequently decreed to be null, and he then took a rule on the executor requiring him to refund the \$11,000 which he had paid for the property. The executor answered that he only had on hand of that sum \$8804, and the Court ordered him to refund that amount, reserving the rights of Aymar to the balance out of any funds that might afterwards come into the succession. We think the District Judge disposed of the rule for contempt properly. The executor had paid over all the funds in his hands except the \$674 28, and this fund he has since paid in obedience to the rule.

The record shows that the appellant, Charles E. Alter, has received every dollar due him out of the funds in the hands of the executor. He had no claims upon the \$8804 returned to Aymar by order of the Court. That fund remained in the executor's hands from the sale of the "batture property" which was annulled, and was very properly returned to its owner.

It would have been strange for the District Judge to have punished the executor for contempt because, in obedience to the order of Court he refunded the money to Aymar.

We do not perceive the force of Appellant's position, that the decision on the rule had the effect of changing his original judgment. We think his original judgment against the succession remains undisturbed.

In homologating the tableau, the Court could only order the executor to distribute the funds in his hands. It could not order him to pay to Alter the \$8804 which had been previously paid to Aymar by order of the Court.

The Judge could not compel the executor to redistribute a fund which he had previously distributed under the order of the Court.

It is therefore ordered that the judgment of the Court below be affirmed with costs.

George Ruleff v. P. S. Nugent et al.

No. 2199.—GEORGE RULEFF v. P. S. NUGENT et al.

Where the certificate of the clerk of the District Court shows that the transcript is incomplete and not such as will enable the appellate court to examine the case on its merits, the appeal will be dismissed on motion.

APPEAL from the Fifth District Court of New Orleans, *Léaumont*, J. *Frank Haynes* and *T. A. Bartlette*, for plaintiff and appellant, *C. Roselius & Alfred Phillips*, for defendants and appellees.

HOWE, J. The appellees move to dismiss this appeal on the ground that the record does not contain as the law requires a full transcript of all the documents filed, evidence adduced, and proceedings had in the court below. C. P. art. 585.

The certificate of the clerk of the Fifth District Court is as follows:

"That the foregoing one hundred and six pages with the record of the case of *Mary A. Nugent v. Jotham Potter et als.*, appealed from the late Fifth District Court of New Orleans, and now of record in the Supreme Court of Louisiana, being No. 1750 of the docket of said Supreme Court, do contain a true, correct and complete transcript of all the documents filed and all the evidence adduced, and of all the proceedings had in the suit of *George Ruleff v. P. S. Nugent*," etc., etc.

It is plain from this certificate that this record does not contain all that is necessary to enable us to examine the case upon its merits. The record can only be complete by adding to it some other record. From the answer to the motion, we infer that the portion absent from the record before us and contained in another record consists of sundry documents. It results that certain documents used at the trial of this case are not in the transcript, and there is no consent under which we can refer to them as contained in some other record. The appellants refer us to the cases of *Bell v. Williams*, 10 L. p. 514, and *Bouguille v. Dédé*, 9 An. 292. The former does not seem to be in point, and the latter is a precedent for the views we have expressed, for in the case before us there is no consent of parties.

The appellants went to trial upon the merits without taking any steps to correct the transcript.

It is therefore ordered that the appeal herein be dismissed with costs. Rehearing refused.

No. 1513.—O. A. SEHNEIDEAU & Co. v. W. T. PENNINGTON & GLIDDEN, owners of Schooner Gipsev.

The fact of non-delivery of goods shipped must be shown before the owner or shipper can recover their value from the carrier.

APPEAL from the Third District Court of New Orleans, *Fellowes*, J. *George L. Bright*, for plaintiffs, *Race, Foster & E. T. Merrick*, for defendants, *Saucier & Michinard*, for intervenors and appellants.

O. A. Schneidman & Co. v. W. T. Pennington & Glidden, owners of Schooner Gipseey.

TALIAFERRO, J. The plaintiffs claim from the defendants, master and owners of the schooner Gipseey, \$1718 72 for supplies furnished and advances made to Pennington & Glidden and the schooner, for which they claim a lien and privilege on the schooner and the property attached. The defendants being absentees, the plaintiffs took out an attachment under which the vessel was seized, and by a subsequent order of court sold. The proceeds of sale, amounting to \$5000, were held subject to legal distribution. Ashby, a creditor claiming priority of lien and privilege over the attaching creditors, came in by third opposition, praying to be paid his debt of \$311 52 with privilege.

F. X. Barbot, also a third opponent, claimed to be a creditor for \$3750 with superior lien to that claimed by the plaintiffs. The judge *a quo* rejected the claim of Barbot and distributed the funds among the various recognized creditors, of whom the plaintiffs and the opponent Ashby were the principal, and directed the remainder if any to be paid over to the defendants.

From that decree the opponent Barbot appeals.

The contest is now solely between the defendants and Barbot. This opponent founds his claim upon a bill of lading which recites that on the seventh of April, 1865, twenty-five barrels of Bourbon whisky were shipped by F. X. Barbot on the schooner Gipseey then at Havana and bound for Matamoros, to be delivered at that port "unto order or to assigns." He avers that the whisky was never delivered, but was sold to pay the debts of the schooner. An invoice dated at Havana, April 6, 1865, shows that the twenty-five barrels of whisky were shipped from Havana to Matamoros by F. X. Barbot for joint account of the owners of the schooner and D. M. C. Hughes, and consigned to order. To the same purport is the certificate of Barney Pennington. The certificate further states that the note given by him at Havana to Hughes for \$700 more or less, was for the one-half interest in the shipment, and at the date of the certificate, October, 1865, was still unpaid. Hughes' receipt for this note appears, showing that he had sold to Pennington a half interest in the adventure for \$745 45. The receipt is dated April 8, 1865. This comprises the sum of the evidence taken on the trial of the opposition of Barbot and we do not see that his case is made out by it. He does not allege that he was the owner of the whisky, or that he had shipped it to his own order. The bill of lading in connexion with the invoice, does not we think establish the ownership to have been in him. Appended to the certificate of Pennington, as appears in the record, is an assignment by Hughes to Barbot "of the due bill annexed." This transfer is dated Havana, July 3, 1867, and doubtless refers to the due bill given to Hughes by Pennington for the half interest sold to him in April, 1865. This operation shows nothing establishing ownership in Barbot of the shipment of whisky by the

O. A. Schneideau & Co. v. W. T. Pennington & Glidden, owners of Schooner Gipsy.

schooner, nor does he show, as he alleges non-delivery of the goods shipped. See 11 An. p. 320.

The appellees pray for damages in this case for a frivolous appeal; but we hardly think the case would fully warrant it.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs in both courts.

No. 1477.—H. G. HODGSON v. CITY OF NEW ORLEANS.

The city ordinance of the city of New Orleans for the year 1866, which declares that "every keeper of a warehouse where produce, goods, wares or merchandise are received on storage, one hundred dollars for each and every warehouse" was intended to impose a license tax of one hundred dollars upon the particular calling or business of keeping a warehouse, and not a tax upon the warehouse itself.

Such a tax is uniform upon all persons engaged in that kind of business.

APPEAL from the Third District Court of New Orleans. *Fellowes, J. Lacey & Butler*, for plaintiff and appellant. *H. D. Ogden*, for defendant and appellee.

TALIAFERRO, J. The plaintiff complaining of the unconstitutionality and excessive character of the forty-second section of the city ordinance approved December 16, 1865, entitled "An act to establish a uniform rate of taxes and licenses on professions, callings and other business, and on carriages, hacks, drays and other vehicles, for the year 1866," took out an injunction to prohibit the city from collecting from him one hundred dollars, the sum assessed to every keeper of a warehouse. On the trial of the injunction in the court below, it was dissolved, and the plaintiff appeals.

The objection is that the tax is not laid upon an entire class, calling or pursuit as it should be, so as to be uniform upon all persons engaged in and pursuing as a business or calling the keeping of warehouses. The plaintiff holds that it is the *warehouse*, and not the *trade or occupation* of warehouse keeping that is taxed. The forty-second section of the ordinance in question reads: "Every keeper of a warehouse where produce, goods, wares or merchandise are received on storage, one hundred dollars for each and every warehouse."

When, by the terms of a law or ordinance imposing a tax, it clearly embraces all who are engaged in the particular business or calling taxed, we are unable to see why it does not fulfill the constitutional provision requiring taxation to be equal and uniform. The forty-second section of the city ordinance just quoted does not declare that all who are engaged in the business or calling of warehouse keeping shall pay a hundred dollars for each and every warehouse; but it does substantially declare the same thing in substance, if not in direct terms, when it announces that every keeper of a warehouse where produce, goods, wares or merchandise are received on storage, shall pay one

hundred dollars for each and every warehouse. The case of *A. W. Meriam v. the city of New Orleans*, 14 An. p. 318, presented a case similar in every essential point to the one now before us. In that case the objection was to the city ordinance which declared that "every keeper of a billiard table, the whole tax being levied upon each and every billiard table shall pay sixty dollars." The same ground of unconstitutionality for want of uniformity and failure to specify the trade or business was taken as in the present case. Judgment was rendered against the plaintiff, and the court said: "Notwithstanding the language of the thirty-fourth section of the ordinance in question declares that a tax of sixty dollars shall be assessed and collected from every keeper of a billiard table, the whole tax being levied upon each and every billiard table, we have no doubt that the intention of the Common Council was to impose a license tax upon the particular calling or business of keeping a billiard table, and not a property tax upon the table itself."

The plaintiff refers to the case of the Police Jury of the parish of Orleans, right bank, *v. Pierre Nougues*, 11 An. 740. We do not think it sustains him. The tax resisted in that case imposed an assessment upon each and every person keeping a dairy within certain limits specified in the ordinance, of \$2 annually for each and every cow. Here there was the lack of equality and uniformity, for as the court remarked, "the ordinance, while professing to tax the occupation really imposes a tax upon cows kept by dairymen within certain limits. The tax is not on all cows within the jurisdiction of the Police Jury, but upon the cows kept by certain individuals, whilst other individuals may keep cows without taxation."

Evidence was introduced on the part of the plaintiff going to show that there were persons who kept private warehouses and received payment for storage, without being required to pay the license tax, and others who kept warehouses for the reception of articles brought to them for repairs, such as boilers, machinery of various kinds, etc., and who also received goods in their warehouses on storage alone, and charged and collected money for such storage without paying for a license. What benefit the plaintiff is to derive from this testimony we are at a loss to conceive. He sets himself out in his petition as keeper of "the Mississippi and Western Warehouses" in the city of New Orleans.

We conclude that the judgment appealed from was correctly rendered.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs in both courts.

Blanche A. Martin v. Taylor and Pinckard.

No. 1507.—BLANCHE A. MARTIN v. TAYLOR & PINCKARD.

The Supreme Court will *ex officio* notice the want of proper parties, and dismiss the appeal without motion. 19 An. 286.

APPEAL from the Fourth District Court of New Orleans. *Théard, J. A. Grima*, for plaintiff and appellant. *A. N. & H. N. Ogden*, for defendants and appellees.

WYLY, J. This appeal was taken by one of the defendants, William M. Pinckard, who has not made his co-defendants parties thereto, by causing them to be cited.

It appears that a citation issued to the co-defendant, Zalmon Taylor, but it was not served on him either personally or at his domicile. C. P. 187, 188, 189. It appears that no citation ever issued for D. R. Carroll, warrantor, who was a party to the judgment.

Both Taylor and Carroll are evidently interested in maintaining the judgment of the lower court, and they should have been made parties to the appeal. 3 R. 436; 5 R. 224; 9 R. 256; 12 R. 180; 8 A. 367; 11 A. 674; 14 A. 315.

Without a motion to dismiss, we will notice *ex officio* the want of proper parties to the appeal. *Tupery v. Lafitte et al.*, 19 A. 296, and the authorities there cited.

It is therefore ordered that this appeal be dismissed at appellant's costs.

No. 2055.—STEPHEN DUNCAN v. JOHN N. HELM.

An amended petition substituting a new party plaintiff on allegations of ownership, in direct conflict with the original petition, will not be allowed, nor will an amendment be allowed showing that the notes sued upon were transferred after suit was commenced and a reconventional demand was filed.

APPEAL from the Thirteenth Judicial District Court, parish of Tensas. *Hough, J. Farrar & Reeves*, for plaintiff and appellant. *Aroni & Collier*, for defendant and appellee.

HOWE, J. By petition filed in this case on the eighth March, 1866, the plaintiff, alleging himself to be a resident and citizen of Mississippi, claimed to recover from the defendant, also of Mississippi, the amount due upon two mortgage notes, and asked for a sale of the property mortgaged.

One note fell due January 4, 1861, and is credited with a partial payment; the other fell due January 4, 1862. They are dated in the parish of Tensas, and payable in New Orleans; they are the sixth and seventh of a series of eight notes, amounting in all to \$49,500; and are secured by a mortgage upon a plantation in the parish of Tensas. The plaintiff in the original petition claims, not as transferee, but as the original payee of the notes and mortgagee of the land.

The defense was usury, it being alleged on behalf of defendant that the consideration of the notes was a loan by plaintiff to defendant of the sum of \$30,000 at the rate of ten per cent. per annum; that he has paid all of said notes in full, except the note in suit, and has paid on the first of the latter the sum of five thousand dollars; that his total payments have amounted to the sum of \$35,750, or \$5,750 more than the plaintiff is entitled by law to recover. He claims in reconvention the amount he thus paid in excess of the principal.

On the twenty-third September, 1867, a supplemental petition was filed as follows:

"Your petitioner, Stephen Duncan, *junior*, residing in Natchez, Mississippi, respectfully represents that, through error of his undersigned counsel, a suit was filed in your honorable court styled Stephen Duncan v. John N. Helm, and numbered twelve hundred and seventy-two on the docket of said court; that said error consisted in using 'Stephen Duncan's name as the plaintiff and petitioner, instead of Stephen Duncan, *junior*, in said suit; that said Stephen Duncan is *dead*, and long before his death transferred and delivered the notes sued upon in said suit, number twelve hundred and seventy-two, to your petitioner, who was the *bona fide* holder and owner of said two notes sued on as aforesaid; whereupon petitioner prays leave to file this *his* supplemental and amended petition, that it be duly served, and that he have judgment as prayed for in the original petition."

It appears that the defendant filed an exception to this "amended petition," though the exception itself is not in the record. It also appears that some evidence was taken on the trial of this exception, but the evidence is not in the record. There seems to be no proof of any of the allegations of this amended petition, except of the death of Dr. Stephen Duncan, and this event took place, as the counsel for plaintiff informs us, in January, 1867.

The case was afterwards tried, and judgment rendered against the plaintiff, rejecting his demand, and decreeing that the defendant recover from the plaintiff judgment in reconvention for the sum of \$2750.

If this is a judgment against Dr. Stephen Duncan, it was rendered against a party deceased and unrepresented. If it is a judgment against S. Duncan, Jr., it is not supported either by the pleadings or the evidence. The amended petition, so called, we are of opinion, ought to have no effect beyond that of a suggestion of the death of the original plaintiff. It should not be permitted to substitute a new party plaintiff, especially on allegations of ownership in direct conflict with the original petition, or if the amended petition is construed to mean that the notes were transferred to S. Duncan, Jr., after the suit was commenced, but before Dr. Duncan's death, it was none the less irregular after the filing of a reconventional demand. *Jones v. Jenkins*, 9 Rob. 180.

Stephen Duncan v. John N. Helm.

The case must be remanded that the legal representatives of the deceased plaintiff may be made parties. It is unnecessary to pass upon the other questions in the case.

It is therefore ordered that the judgment appealed from be avoided and reversed, and the cause remanded to be proceeded with according to law, and that the appellee pay the costs of the appeal.

No. 1533.—CHARLES SEUZENEAU v. B. SALOY and THE SHERIFF.

Where the consideration of a promissory note, secured by a mortgage on real estate, is shown to be Confederate treasury notes, the holder cannot enforce the mortgage rights against the property mortgaged, nor recover on the note.

A PPEAL from the Sixth District Court of New Orleans. *Duplantier, J. E. Filleul*, for plaintiff and appellee. *C. E. Schmidt*, for defendants and appellants.

WILY, J. The defendants have appealed from a judgment perpetuating an injunction which restrains them from enforcing their mortgage on the property of the plaintiff.

The grounds for the injunction are that the note had no lawful consideration, having been given for Confederate money, and the act of mortgage was illegal, having been passed by a notary whose only authority was derived from the rebellious government, and who states in the act of mortgage that it was passed in the "second year of the Independence of the Confederate States"—that a certified copy of said act was not sufficient authentic evidence to sustain the order of seizure and sale.

The District Judge after considering the evidence came to the conclusion that the plaintiff received from the defendants "no other currency in exchange for their note and mortgage than the treasonable issue of the Confederate States," and therefore perpetuated the injunction.

After a careful examination of the evidence we have arrived at the same conclusion.

The testimony of the witnesses and the declaration contained in the act of mortgage are sufficient to satisfy us that the transaction was based on Confederate treasury notes.

The consideration was illegal and the contract cannot be enforced under the settled jurisprudence of this State. 20 A. 167.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Culver, Simonds & Co. v. H. J. Leovy et als.—B. B. Hart, surety on appeal bond.

No. 1487.—CULVER, SIMONDS & CO. v. H. J. LEOVY et als.—B. B. HART, surety on appeal bond.

The signing of a final judgment by the judge, is a judicial act, which can only be performed in term time. Acts of 1866, M. 86.

The signature of the judge placed to a final judgment, out of term time, will have no effect.

APPEAL from the Sixth District Court, of New Orleans. *Duplantier, J. Race, Foster & E. T. Merrick*, for plaintiffs and appellees. *H. J. Leovy and George W. Christy*, for defendants and appellants.

HOWELL, J. This is an appeal from a judgment on a rule against the surety on an appeal bond, rendered on twenty-seventh June and signed on twenty-second July, 1867.

A rule for a new trial was taken by the surety on the twenty-ninth June, and fixed, on motion, for the fourth day of November following. The order fixing this rule was rescinded on the fifteenth July, and the rule fixed for trial on Monday, twenty-second July, notice of which was given to the surety, who on the day fixed opposed the trial of his rule on the grounds that it had already been fixed for November; that such a rule could not be tried in vacation, and if tried, judgment could not be signed in vacation. These objections were overruled, the motion for a new trial was dismissed and the judgment against the surety was signed on the same day, from which this appeal was taken on the thirtieth July, 1867.

Conceding that it was within the discretion of the judge *a quo* to rescind his order fixing the rule for trial on fourth November and fix and try it in vacation (upon which we express no opinion), we think the signing of definitive judgments is a judicial act, which can be performed only in term time. It is the completion, the perfecting of the judgment and renders it executory.

The act No. 86, of 1866, expressly provides that the District Courts in New Orleans “shall be open from the first Monday of November to the fourth day of July; and for criminal and probate causes, for granting interlocutory orders and writs of arrest, *habeas corpus*, injunctions, sequestrations, attachments, mandamus and provisional seizures, on a motion to quash, and not upon their merits, they shall remain open all the year; also for the purpose of trying proceedings instituted by a landlord for the possession of leased property” The signing of a definitive judgment, which gives it vitality, is not granting an interlocutory order, and upon the maxim “*expressio unius, exclusio alterius*,” we must infer that such an act was not authorized by the above statute. The law maker has been careful to express for what particular proceedings and business the courts shall be open all the year, and the act necessary for making judgments in other matters final, not being mentioned, is excluded.

Counsel for plaintiffs say, so soon as the obstacle to the judgment

21	306
48	907
21	306
50	441

Calver, Simonds & Co. v. H. J. Leovy et als.—B. B. Hart, surety on appeal bond.

becoming final, interposed by the rule for a new trial, was removed by the overruling of the motion, it was the duty of the judge to sign the judgment, as he did. This is so, if it was at a time when he could exercise such judicial power.

When the term closed on the third day of July, 1867, the surety knew that the judgment against him had not become final, and consequently that it could not regularly become so until the next term, as the law had not authorized the exercise of the necessary judicial function in vacation.

The signing of the judgment at the time was a nullity, therefore the judgment is not final. It may yet be legally signed.

It is therefore ordered that the appeal be dismissed.

No. 1505.—C. A. GAYARRE v. H. T. HAYS, Sheriff, et als.

21	307
108	207
21	307
115	489

No appeal will lie from a judgment dissolving an injunction where the amount in dispute is not above five hundred dollars. The fact that the property seized exceeds five hundred dollars in value will not give the Supreme Court jurisdiction of the appeal from such judgment.

APPEAL from Third District Court of New Orleans. *Fellows, J. Race, Foster & E. T. Merrick*, for plaintiff and appellant, *E. W. Huntington*, for defendants and appellees.

WYLY, J. Appellees move to dismiss this appeal because the court has no jurisdiction, the matter in dispute not exceeding five hundred dollars.

Plaintiff enjoins a judgment against him as security on two injunction bonds for twenty per cent. on the two executions enjoined, that is to say, twenty per cent. on one execution for one thousand dollars, fifty dollars attorney's fees and costs, and twenty per cent. on the other execution for three hundred and seven dollars and sixty-two cents, fifty dollars attorney's fees and costs.

The matter in dispute is not the full amount of the two executions; it is the amount of twenty per cent. thereon, attorney's fees and costs, for which judgment was rendered against the plaintiff—this is less than five hundred dollars. Appellant contends that the value of his lot seized to satisfy said judgment against him exceeds five hundred dollars in value, and therefore this court has jurisdiction on that account. He cites the decisions in 12 R. 519; 6 R. 4, and 1 A. 310, to support his position that this court has jurisdiction where the value of the property seized exceeds five hundred dollars, although the judgment under which it was seized is below that amount.

The cases he has cited refer to the opposition and injunction of third parties who claim to be owners of the thing seized. In such cases the matter in dispute is not the judgment, but the ownership of the property seized. In this case, however, the property of the plaintiff was

C. A. GAYARRE v. H. T. HAYS, Sheriff, et al.

seized by the sheriff under an execution against him; and the contestation is about the validity of the judgment, and not the ownership of the property. The matter in dispute is therefore below the jurisdiction of this court.

It is therefore ordered that this appeal be dismissed at appellant's costs.

No. 1538.—LOUIS TOYE v. THOMAS MCMAHON.

In an action in damages for slander, the burden falls on the plaintiff of showing that the language complained of was used by the defendant, and with malicious intent.

APPEAL from the Fourth District Court of New Orleans. *Thomas, J. Saucier & Michinard*, for plaintiff and appellant, *C. E. Schmidt*, for defendant and appellee.

HOWE, J. This is an action of slander, the plaintiff alleging that he is a "British subject of pure white, or Caucasian blood," and that the defendant has injured him to the extent of five thousand dollars by stating publicly at a meeting of the Hackmen's Benevolent Association that he, plaintiff, "was a colored man, meaning thereby a person of African origin," and thus causing him to be "disgracefully expelled from the association." The usual allegations of malice and damage are made in the petition.

The defendant, after pleading the general issue, specially avers that at a preliminary meeting, held for the purpose of organizing the association, he was urged by several persons present to call the attention of the meeting to the fact that the plaintiff was supposed by many to be a man of color, and that some eight years previous he had applied for admission to the then Hackmen's Association, and had been rejected for this reason. That "to save complaint" defendant "desired it to be put to the meeting whether they were satisfied to have the plaintiff in the association," and the meeting determined to refund the plaintiff the dollar he had paid on giving in his name, and to strike the name from the list of those who desired to become members. He pleads that these statements were true, and were not uttered with any malice.

There was judgment for defendant, and plaintiff has appealed.

The voluminous record establishes the fact clearly enough that the plaintiff is a white man; but it does not seem to prove conclusively that the defendant uttered the language complained of and with the intent charged. We presume the District Judge was satisfied that the answer of the defendant was substantially correct, and we perceive no reason for reversing his decision. It does not appear that the plaintiff ever belonged to the association from which he alleges he was expelled, but merely that his application was rejected, and this fact may have had its influence.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

B. E. Diamond v. G. L. Cain.

No. 1936.—B. E. DIAMOND v. G. L. CAIN.

The omission in the Constitution of 1808 of article 133 of the Constitution of 1804, left the whole subject of the corporation of the city of New Orleans and its police regulations under the power and discretion of the Legislature.

Act No. 1, approved July 9, 1868, creating a Board of Police Commissioners for the City of New Orleans and giving them full power to remove and appoint the police force, and repealing all other acts and parts of acts in conflict with its provisions, divested the Mayor of the city of New Orleans of all authority to appoint a chief or other policeman. Articles 159 and 42 of the Constitution of 1868 were not violated in the passage of this act. (See acts Nos. 74 and 145 of 1868, and Nos. 60 and 92 of 1869.)

The appointment of a chief of police by the Mayor of the city of New Orleans after the passage of act No. 1, approved on the ninth of July, 1868, was without any legal force or effect, and such officer so appointed had, by virtue of his appointment, no interest in the office of chief of police, nor in the office of superintendent of metropolitan police created by act No. 74, approved September 14, 1868. Having no interest in the office, he was not entitled to the writ of *quo warranto* nor injunction.

A APPEAL from the Sixth District Court, parish of Orleans. *Cooley, J. Leory, R. N. Ogden and Alfred Philips*, for plaintiff and appellee. *J. Hawkins and E. Filleul*, for defendant and appellant.

ARGUMENT FOR DEFENDANT AND APPELLANT.

I. *The relator is not entitled to a writ of quo warranto.*

A *quo warranto* is only issued for the decision of disputes between parties in relation to the offices in corporations as when a person usurps the character of a mayor of a city, or such like. With regard to offices of a public nature, that is, which are conferred in the name of the State by the Governor, with or without the consent of the Senate, the usurpations of them are prevented and punished in the manner directed by the Penal Code. See C. P., article 863.

Article 869 C. P., provides, that a mandate to prevent the usurpation of an office, in a city or other corporation, may be obtained by any person applying for it.

And article 870 provides, that the court, after having declared the party not qualified, shall direct the corporation to proceed to a new appointment.

It is clear on the face of the pleadings, that these articles, which are the only text upon the authority of which a *quo warranto* can issue, do not apply to George L. Cain. (See the case of *Terry v. Stauffer*, 17 A. R. 311, where the *quo warranto* was denied, under similar circumstances.)

Cain is not a corporation officer; he is appointed by the Board of Metropolitan Police Commissioners, who are appointed by the Governor. (See act 74, 1868, and article 863 C. P.)

Being a subordinate officer of a State department, his commission partakes of the nature of the commission of his superior officers, according to the rule: *Subrogatum sapit naturam ejus cui subrogatur*. See *Calvin's Lexicon*, verbo *Subrogandus*. This is self-evident, and requires no further argument. The counsel might well stop here, and this would be enough to dismiss the whole proceeding. But as the public is interested in this case, it is good that the case of the commonwealth should be well, fully and zealously examined and defended, as remarks *Cicero*. But in a *quo warranto* case, the petition must be in the name of the State, because the State is the party that has the chief interest and almost the sole interest that the franchises should not be abused or usurped. We look in vain in the record, and to the title of the suit, to see the name of the people or State of Louisiana as plaintiff in this case, and we see that the proceedings are conducted in the private name

of the plaintiff, a ridiculous usurpation of the rights of the State; nor is the plaintiff to be listened to, when he pretends to have acted under the two acts of the Legislature of 1868, providing a remedy against usurpation and intrusion into a public office, etc. (Acts No. 58 and 156.)

Because his petitions do not contain a single word or allegation to that effect, nor did he claim to be interested in the office of Superintendent of the Metropolitan Police, nor did he allege that Cain usurped the said office; and moreover, the reading of those two acts shows so clearly that such an action cannot be instituted without the concurrence of the Attorney General, the plaintiff can take nothing by his equivocation, all doubts in such a case being interpreted against him who, having the opportunity of explaining himself, has been the cause of the obscurity found in the pleadings.

The plaintiff has prayed for a writ of *quo warranto*, and to that prayer his petition must be limited.

The nature and rules which govern the proceedings in *quo warranto* are so anomalous, and so different from all the other rules of practice, that it is impossible to cumulate *quo warranto* with other remedies and pleadings in the same suit; the judgment to be rendered in such a suit is dictated by law, and is only intended to remedy one wrong. The pleadings are anomalous in this—that the king or State has nothing to prove, and the *onus probandi* and justification is thrown upon the defendant, and if he fails in his justification, judgment must go for the king or State. These proceedings are also considered in the light of a criminal action. We repeat that the peculiar rules which govern *quo warranto* are repugnant to the other rules of practice, and other matters cannot be heard upon the trial of such issues. See Bouvier's Dictionary, Angel and Ames, Kent's Commentary, and all the authors.

Should, however, the plaintiff be entitled to a writ of *quo warranto*, the defendant, by showing his warrant of appointment, and the law creating the board of metropolitan police, has fully complied with the law, and he would be entitled to a judgment.

II. That by divers acts of the Legislature, the office of chief of police of New Orleans has been abolished and no longer exists; that the Mayor of New Orleans has no authority to appoint any officers or members of the police of New Orleans.

The respondent avers that there is no such office as that of chief of police of New Orleans; he holds the negative. The burden of proof is on the party affirming that such an office exists to prove its existence.

In an action in the nature of a *quo warranto*, the question may be raised whether there is such an office as the defendant or plaintiff has assumed to fill; the object of the Code of Practice relative to such actions is to provide a speedy and effective mode of determining the rights of individuals to discharge the duties of an office; necessarily involves the determination of the existence of the particular office. See 24 New York Reports, p. 86.

The article 133 of the Constitution of 1864, gave to the Mayor of the city of New Orleans the power to *select* the police of the city; the members of the police force were to hold their office during good behavior, removable only for cause by a police commission composed of five citizens appointed by the Governor.

The act No. 14, session acts of 1866, entitled an act "to organize the police of the city of New Orleans, and to create a police board therein," was enacted under the Constitution of 1864. The Constitution of 1868 did not retain the article 133 of the Constitution of 1864, and therefore left the organization of the police force in New Orleans as a proper subject of legislation for a subsequent Legislature.

On the ninth July, 1868, the Legislature passed an act which divested the Mayor of New Orleans of the power of appointing or selecting the

R. E. Diamond v. G. L. Cain.

policemen of New Orleans and vested the appointment and administration of the police of New Orleans in a board composed of five police commissioners; that law repealed all laws or parts of laws inconsistent with it, and took effect from its passage. (See acts of 1868, act No. 1.)

On the fourteenth September, 1868, the Legislature passed the act entitled "an act to establish a metropolitan police, and to provide for the government thereof." (See act No. 74, 1868.)

This act gives the exclusive and absolute control of the police of the city of New Orleans, made a part of the metropolitan police district, to the board of "Metropolitan Police." (See section 2 of said act.)

On the seventh October, 1868, the Legislature re-affirmed the act No. 1, creating the Board of Police Commissioners by fixing their salary and allowing them their pay, from the day of their creation to the day they were superseded by the Metropolitan Police act. (See act No. 145, session 1868).

On the nineteenth August, 1868, the Legislature passed an act entitled "an act to determine the mode of filling vacancies for which provision is not made in the Constitution." The first section of this act provides that when a vacancy occurs in any office, *State, parish or municipal*, the vacancy shall be filled by the Governor. (See act No. 27, 1868.)

It will be seen that the Mayor of New Orleans on the twenty-eighth October, 1868, when it is alleged that he appointed Robert E. Diamond chief of police of New Orleans, violated on that day four acts of the Legislature, to wit: Acts No. 1, 27, 74 and 145, and that his appointment in opposition to the statutes of Louisiana, was nothing but a ridiculous and absurd act of folly, as well as an act of rebellion against the Legislature of Louisiana.

This commission gives no right to Diamond; any assertion of any right under such a commission cannot for one moment be listened to by a tribunal whose first duty is to cause the laws to be observed and obeyed.

The Mayor acted in contravention of law. Article 12 C. C. says, *whatever is done in contravention of a prohibitory law is void.*

What a strange spectacle this case presents! Those who should be defendants and praying for the mercy of the court, present themselves before the courts with a threatening and defiant attitude. The plaintiff, R. E. Diamond, then has no standing in court. He has made the plea that the metropolitan police act is unconstitutional, because it violates articles 94, 117 and 118 of the Constitution.

Courts of justice do not sit to examine abstract questions of law and to give their opinion about questions which, without any interest, any malignant parties may propound to them. Courts of justice are established for the purpose of settling serious disputes which may arise between citizens in regard to the rights of person and property. The organization and government of the police of the city of New Orleans were entrusted to the municipal corporation, created by the Legislature under the name of the city of New Orleans. In the course of time the Legislature thought proper to divest the corporation of the police power and to vest it in another body; this measure is purely political and administrative, and cannot, under a constitution like ours, which acknowledges the principle of the division of the powers of the government, become the subject of a judicial inquiry. Such a question is beyond the limits of the judiciary power, and exclusively belongs to the two other branches of the government.

The judiciary can only interfere if such legislation deprives a citizen of any vested rights or if it impairs the obligation of contracts.

What vested rights can R. E. Diamond have in the government and police of the city of New Orleans? What contracts in which he has an interest has been impaired?

In what capacity does he present himself? As Chief of Police. Ad-

mitting that his appointment was regular, this would not give him the right to plead the unconstitutionality of such a statute, because the government of the police is not an appendage of his office. He would be a subordinate officer of the corporation of New Orleans, and he has no power to sue for any right belonging to the corporation. He cannot sue *vicariously* for the right of another; he is a self-constituted *vicarius alieni juris* and cannot be heard.

In the second volume of Black's Reports, p. 513, we learn that the city of Sheboygan had issued certain bonds, and a party who had no interest in the matter chose as a pretense for his intervention to argue the unconstitutionality of the measure. The Supreme Court refused to hear him, and said: "We hear of no complaint from the bondholders, it does not belong to the complainant, *vicariously*, to enforce their contract and to protect their rights. *Gilman v. City of Sheboygan*, 2 Black's Reports, page 513.

Our Code of Practice defines the right of action thus: It is the right given to every person to claim judicially what belongs to him. C. P. art. 1.

A plea to the unconstitutionality of a statute was made in the 12th A. R. The Supreme Court first examined into the capacity of the party making the plea and said:

"The act of the Legislature certainly invaded no vested right of a company, which came into being ten years afterward, and it is only for the party whose rights are invaded to plead the nullity of a law impairing the obligation of a contract." *Navigation Company v. City of New Orleans*, 12 A. R. 366.

In New York it has been decided, "That the people cannot set up to invalidate a charter granted by the Legislature, that it confers a power in violation of the Constitution of the United States, as a power to bridge a navigable stream. Such objection, if it were valid, can be taken only by those who have been impeded in lawful commerce." *People v. Saratoga and Rensselaer Railroad*, 15 Wendel Rep. 113; *Abbot's New York Dig.* vol. 4. p. 643, No. 20.

Robert E. Diamond cannot certainly say that the statutes of Louisiana, passed before he received his commission from Conway, invaded any of his pretended rights which were not then in existence.

Though the undersigned have fully demonstrated that plaintiff or relator in this extraordinary case of *quo warranto* has not shown any right to appear before a court of justice, we will show to your honors that the pleas of unconstitutionality have no foundation in fact and in law.

Does the act No. 74, 1868, violate article 94 of the Constitution? This ground was abandoned in the court below. Article 94 of the Constitution says: "That no judicial power, except as committing magistrates in criminal cases, shall be conferred on any other officers than those mentioned in this title, except such as may be necessary in towns and cities," etc., etc.

There is not a single word and sentence in the act No. 74 which has any reference to that article of the Constitution. In fact, the act No. 74 treats entirely of a different object, and is entirely foreign to that article. The plea is absolutely frivolous, and should a part of a law be unconstitutional, that part only would be declared unconstitutional, and the other parts would be declared constitutional if they do not violate the Constitution.

The law violates article 117 of the Constitution, which says: "That no person shall hold at the same time more than one office of trust and profit."

The act No. 74 does not create an office, but it confers new duties on the Lieutenant Governor. This act says, "that by virtue of his office he shall be *ex officio* President of the Board of Metropolitan Po-

lice." The conferring of new duties or powers on an officer of the executive department is authorized by the Constitution, when those duties or powers belong to the same department or branch of government; this is the rule of the Constitution. The exception to that rule is found in article 82, which says, "no duties or functions shall be conferred by law on the District or Supreme Court Judges, except those that are judicial;" and in article 94, which says, "that no judicial functions shall be conferred upon any other officers than the judges mentioned in the Constitution, except the judicial powers conferred upon committing magistrates." The words *ex officio* mean by virtue of his office, and the Legislature can extend the powers of the Lieutenant Governor as it frequently extends the power of the Governor by making him *ex officio* president of the board of the Charity Hospital, president of the board of emigration, and so on *ad infinitum*.

The Legislature, as to that extension of powers, not being limited by the Constitution, has an absolute and sovereign discretion.

Malitias hominum non est indulgendum is a rule which governs absolutely in matters where nullities are invoked, and if the party invoking the nullity does not show his interest, he is reduced to silence. The principles which we invoke have been sanctioned by the courts of New York: "The power conferred upon the Supreme Court under the laws for opening streets in the city of New York, to appoint commissioners of estimate and assessment, and to review their reports," is not a violation of articles 5 and 7 of the constitution of New York of 1822, by which the judges of that court are forbidden to hold any other office or public trust. The statutes are an extension of the jurisdiction of the court, and not an appointment to office. (See the authorities quoted. Abbot's New York Digest, vol. 1, page 673, No. 296.)

It was also decided in New York:

That the provision of article 6 of the constitution of New York, "that the judges of the Court of Appeals and Supreme Court shall receive a compensation, to be established by law, which shall not be increased or diminished during their continuance in office," does not prevent an additional compensation which is authorized by the Legislature. (*Idem*, No. 295.)

But admitting that the Legislature had no right to confer new duties upon Lieutenant Governor Dunn, what effect would this provision have upon the rights of Diamond? None at all. It would be immaterial as to the public. It would be in the discretion of the Lieutenant Governor to refuse to perform such duties, as President *ex officio* of the Board of Metropolitan Police, or, following the respectable precedent of the circuit courts of New York, continue *ex gratia* voluntarily to execute the duties entrusted to them by an act declared unconstitutional because it assigned to the circuit courts ministerial duties. (See Kent's Commentaries, vol. 1, No. 451.)

At all events, no one could properly bring the question of constitutionality of such a provision, because such a provision divests no one of his vested rights and does not impair the obligation of any contract. The question of constitutionality could only come before the court upon the refusal of the Lieutenant Governor to perform duties imposed upon him by a statute which he would not obey, as in the cases of the circuit judges and North Carolina judges, quoted by Kent.

These authorities apply to our case; and further, as we shall see in a moment, the act No. 74 has been repealed and re-enacted, and all rights of action growing out of the existence of said act in progress of litigation are at an end. No judgment can be rendered under a law which has ceased to exist. Does the act 74 violate article 118 of the Constitution of 1868?

That article 118 provides that taxation shall be equal and uniform through the State, etc,

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There is not a word about taxation, nor is there any power to levy taxes of any kind given to the Metropolitan Police Board.

By section 27 it is made the duty of the Board to convene as a board of estimate and apportionment, to proceed to make up a financial estimate of the sums required for their expenses, etc., and the proportion of expenses applicable to each of the cities and parishes in the metropolitan district in ratio of the number of police officers and men authorized by this act and employed by such cities and parishes respectively.

The undersigned counsel cannot discover what is unconstitutional in such a provision of a statute, nor has Robert E. Diamond shown what property he possesses that has not been uniformly taxed, and in what manner Cain, who does not belong to the Board of Commissioners of Metropolitan Police, has taxed him unlawfully or impaired any of the obligations of contracts in which he is interested.

Truly never were arguments so devoid of logic and reason presented to any tribunal!

The claim of the relator is not only unfounded in law and in fact, but is only urged for the purpose of brewing trouble, disorder, confusion and anarchy.

IV. The defendant annexed his warrant of appointment according to the article 17 of the metropolitan act, and this is a sufficient, full and complete return to the *quo warranto*, and judgment should have been given for the defendant.

V. That the relator and plaintiff is not entitled to a writ of injunction, nor can the plaintiff obtain an injunction in this case and thus suspend the functions and duties of officers belonging to the executive or legislative branch of the government.

In the case of *Terry v. Stauffer*, 17 A. R. 313, a case which resembles this, an injunction was applied to for the purpose of preventing the defendant from exercising the functions of Register of Voters of New Orleans, a State office, claimed by Terry. The District Court refused the injunction, and the refusal was sustained by the Supreme Court.

Judge Labauve, who was the organ of the court, said: "It would require the strongest showing on the part of a private individual to induce a judge to enjoin a State officer from performing his functions; and we are not prepared to say that it can be done in any circumstances. The effect of such injunction would reflect upon and affect materially the government, and might stop, in certain cases, the government machinery. *Terry v. Stauffer*, 17 A. R. 312.

This doctrine is adopted by the Federal Courts. "The courts of the United States have no authority to enjoin the officers of the government against performing any act not merely ministerial." See authorities quoted in Abbot's National Digest, *verbo* "Injunction," No. 48.

In New York it has been decided that the State courts have no power to restrain by injunction the acts of the officers of the State who are proceeding under the authority of the law, and that the fact of the statute in question being unconstitutional, forms no ground for granting the injunction. *Sedgwick Constitutional Law*, p. 577.

But, if the plaintiff had any right to injunction, or to a *quo warranto*, it is not against the defendant that the writ should have issued, but against his principals.

In general, an injunction will not be allowed against an agent where the principal is not made a party. *Osborn v. Bank of the United States*, 9 Wheaton's Reports, p. 739.

We think that it has already been abundantly proved that the plaintiff was not entitled to an injunction.

To complete their task, the undersigned counsel will review some points which do not appear in the pleadings, and were made, *ex proprio motu*, by the District Judge. Case of interest, *Mason* 14,

The District Judge says;

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"The next point to be examined is the alleged unconstitutionality of the act of the Legislature No. 1, entitled 'An act creating a Board of Police Commissioners,' and approved July 9, 1868.

"The position taken in the argument by defendant's counsel is that the court cannot pass upon the constitutionality of this law, because it does not possess the power to pass upon such questions when raised collaterally. I must confess the distinction attempted to be made between collateral and direct issues, as applicable to the present case, is too acute for my comprehension. It may be sound; and it may also be that my want of the proper capacity is the cause that I have not understood the application of the argument; but I acknowledge that I do not see any force, nor yet any application in the point."

The issue is no where presented in the pleadings, of the constitutionality of act No. 1, acts of 1868.

There is no prayer in the two petitions of the plaintiff, asking that this act should be decreed unconstitutional. The question did not even come incidentally before the court. In the argument of the defendant's counsel, it was stated that the twenty-sixth section of the city charter of 1856 was repealed by the said act No. 1, when the judge stopped the counsel and remarked to him that this act was unconstitutional; the counsel for the defendant replied immediately that this act No. 1 was on the statute book of Louisiana; that no judgment of any court had yet pronounced it to be unconstitutional, and until such a judgment the act must be respected and obeyed as the law of the land, and that the constitutionality of a law could not be inquired into incidentally, and when quoted in the argument of a case.

The judge seemed to be much surprised and astonished at the doctrines advanced by the counsel for the defendant and sarcastically remarked, "that the distinction attempted to be made between collateral and direct issues, as applicable to the present case, was too acute for his comprehension." (See Record, page 47.)

The counsel of the defendant conscious of the rectitude and the justness of the principles of constitutional law set down by them, was much more astonished than the learned judge, to hear the expression of any doubt about the soundness of the doctrine advocated by him, *Eh ! Quoi ! vous etes juge dans Israël, et vous ignorez ces choses !*

Can a party plead collaterally and incidentally that a law is unconstitutional?

In Kent's Commentaries, vol. 1, No. 450, note 1, we read:

Courts will not inquire collaterally into the constitutionality of legislative enactments. *State v. Rich*, 20 Mis. 393; *Miller v. State*, 3 Ohio St. 475.

In the case of *Dorsey v. Vaughan*, 5 A. R. 156, Vaughan as sheriff executed a writ of *fieri facias* against the property of Dorsey. Dorsey sued out an injunction, and as one of the grounds of the injunction alleged that Vaughan could not act as sheriff because in violation of the article 126 of the constitution of 1846. He held at the same time more than one civil office. The Supreme Court said:

"We do not recognize the right of the plaintiff to have the question of forfeiture of office determined in this mode of proceeding." See 5 A. R. 156.

The Supreme Court of New York decided—That the rule, that no court should declare a legislative act unconstitutional unless it is *glaringly* so, applies with peculiar force to the decision of a single judge, on a *collateral motion*. Abbott's New York Digest, vol. 7, p. 139, No. 2.

Notwithstanding these authorities which establish beyond a doubt the principle that a court cannot incidentally and collaterally pronounce a law to be unconstitutional, the District Judge proceeded to make himself the judge of the proceedings of the Legislature of 1868. He says—Record p. 50—

"The ground taken against the validity of the act of the ninth of July, 1868, is, that it was passed by the House of Representatives and Senate before the General Assembly had acted upon the proposed fourteenth amendment to the Constitution of the United States. This objection is derived from article one hundred and fifty-nine of our Constitution, which reads as follows:

"ART. 159. The General Assembly, elected under this Constitution, shall hold its first session in the city of New Orleans on the third Monday after the official promulgation aforesaid, and proceed immediately upon its organization to vote upon the adoption of the fourteenth amendment to the Constitution of the United States, proposed by Congress, and passed June 13, 1866; said General Assembly shall not have power to enact any laws relative to the per diem of members, or any other subject, after organization, until said constitutional amendment shall have been acted upon."

"By the journals of the House of Representatives, it appears that the fourteenth amendment was acted upon by the House on the first of July, 1868, having suspended the rules for that purpose. See journals House of Representatives, page 8. The same resolution ratifying the constitutional amendment was only finally acted upon by the Senate on the ninth of the same month; but before this, viz: on the second of July, the act No. 1, under discussion, was introduced in the House of Representatives, and passed on its first reading. Journal House of Representatives, page 10. And the third and final reading of this bill occurred on the fourth of July. See journal House of Representatives, page 14. Now it is plain that though on the second of July the House of Representatives had acted on the fourteenth amendment the Senate had not. The action required by article 159 of the Constitution is, that of the 'General Assembly;' and according to article 15 of the Constitution the 'General Assembly' consists of two distinct branches, the 'House' and the 'Senate.' It is a rule which is invariable upon such questions that the Legislature is presumed to have fulfilled the conditions necessary to invest it with legislative authority; but this presumption is completely rebutted when its own journals, besides proving the passage of a law, also establishes the non-fulfillment of the only condition upon the performance of which it had the power to enact the law. The act of the ninth of July, 1868, entitled 'An act creating a Board of Police Commissioners,' having been passed in violation of the one hundred and fifty-ninth article of the Constitution, is therefore null and void; and no repeal of the twenty-sixth section of the city charter, under the act of 1856, was effected thereby."

Taking for granted that the statement of the Judge is correctly copied from the journals of the House and Senate, we candidly assert that the Judge has drawn the most erroneous conclusion from his own premises. Far from showing any violation of the Constitution, this statement shows a most faithful and correct obedience to article 159 of the Constitution. The House first *passed* the resolution for the ratification of the fourteenth amendment and sent it to the Senate and proceeded to their ordinary business of legislation. No act of the Legislature could have any effect before the ratification of the fourteenth amendment.

The Senate concurred in the resolution ratifying the fourteenth amendment, and afterwards concurred in the act No. 1, sent from the House of Representatives, so the act No. 1 was enacted after the ratification of the fourteenth amendment by both houses. It is not claimed by the defendant that this act No. 1 was enacted or took effect before the ratification of the fourteenth amendment, but it is maintained that it was enacted after the ratification, as the journals will show. This act No. 1 is within the scope of legislative authority and therefore constitutional.

The article one hundred and fifty-nine of the Constitution did not

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use the word *pass*, but used the word *enact*. There is a difference between these two verbs. To pass, conveys the meaning of proceeding or moving to the end of legislative action, which is the enactment. A law is said to pass when it is in progress from one house to another; when it has reached its final stage it is said that the law is enacted, and this seems to be the definition of Webster's Dictionary, *verbo enact* where this example is quoted from Mr. T. Bigelow: *Shall this bill pass to be enacted?*

But there is a very serious objection to the conduct of the Judge. By what authority does he supervise the acts of one of the co-ordinate branches of the government? By so doing he himself violates the Constitution and usurps an authority which does not belong to him, he disobeys the precepts and doctrine settled by the Supreme Court, and we have no doubt that his usurpation will be discouraged by this Court.

In *Nicholson v. Thompson*, 5 R. R. 367, this Court said: The judicial department cannot supervise the acts of the co-ordinate branches of the government, it decides only on the rights of parties in controversy which have assumed a judicial form. 5 R. R. 367.

Neither the journal of the House nor of the Senate was offered in evidence. They are not legitimate evidence. If they had been offered, objection would have been made, and if received, a bill of exception would have been taken.

In the case of the *People v. Devlin*, 33 N. Y. Reports, p. 269, it was decided, "That the courts cannot examine the legislative journals or other evidence to ascertain parliamentary irregularities in the proceedings resulting in the passage of the act. If the act is constitutional and passed by a constitutional vote, legislative journals are not legitimate evidence to impeach it on the ground of irregularity or departure from parliamentary usage in the proceedings of the Legislature." *Abbott's New York Digest*, pages 262, 424, 425.

Whatever may be the irregularities or violations of the parliamentary rules when a bill has passed both branches of the Legislature and has been signed by the appropriate officers and sent to the Governor for his approval and signature, it has passed beyond the control of either house, and such a bill becomes the law of the State. *Abbott's N. Y. Digest*, vol. 7, pages 424 and 425.

The Supreme Court of Missouri sustained the same doctrine as the court of New York. The court said: "In our investigation, we have not met with a single case in which the courts have looked behind the statute roll in order to determine whether in passing a law the members of the Legislature conformed their conduct to the rules directed by the constitution, to be observed in framing laws." *Pacific Railroad v. Governor*, 23 Mo. 333.

See also the same doctrine maintained by the Supreme Court of Mississippi. 32 Mississippi Reports, p. 650.

The Supreme Court of Louisiana will no doubt maintain the same principles, and decree that the act number one, 1868, is constitutional, and this decree will annihilate at once the pretensions of Conway and Diamond.

HOWELL, J. The plaintiff, alleging that on the twenty-ninth October, 1863, he was duly appointed and commissioned as Chief of Police in and for the city of New Orleans by the Mayor thereof, whose authority so to do is derived from the city charter, and that the defendant, G. L. Cain, without legal authority and in violation of plaintiff's rights, claims and usurps the office and is pretending to perform the duties thereof to the injury of plaintiff, whose rights he refuses to recognize,

prayed for a writ of *quo warranto*, directing said Cain to show by what authority he holds, claims and usurps said office, and for a writ of injunction restraining him from interfering with plaintiff in the discharge of the duties of chief of police, with damages.

The writ of *quo warranto* was issued returnable on a day fixed and a rule to show at the same time why an injunction should not issue. Subsequently an amended petition was filed setting forth that said Cain was acting as chief of police of New Orleans by virtue of his appointment as "Superintendent of the Metropolitan Police," made pursuant to an act of the Legislature, entitled "An act to establish a Metropolitan Police District and to provide for the government of the same," approved fourteenth September, 1868; that his acts as such violates the vested rights of plaintiff as chief of police; that he usurps all the functions of said office under color of said appointment and refuses to plaintiff access to the records and office room of the chief of police of New Orleans to the injury of plaintiff and danger to the public peace; that the acts and doings of defendant violate the letter and spirit of the aforesaid act of the Legislature, which in no manner conflicts with the vested rights of plaintiff as chief of police under the city charter and ordinances; that said act violates articles 94, 117 and 118 of the Constitution of this State, and vests no rights in the defendant, and closing with the prayer of the original petition.

The defendant, without excepting to either petition, answered with a general denial and a special denial that plaintiff is chief of police or that any such office exists, or that the Mayor has any authority to make such appointment, and avers that plaintiff has no right to the writ of *quo warranto*, and his claim is in contempt of the laws of the State; that by divers acts of the Legislature the said office of chief of police has been abolished and the Mayor deprived of any power to appoint police officers; that on second November, 1863, he, plaintiff, was appointed superintendent *pro tempore*, and on ninth same month was duly elected and qualified superintendent of the "Metropolitan Police force," by the Board of Metropolitan Police, and he is now exercising the duties thereof; that the allegations of the petitions are untrue and insufficient for an injunction, which cannot issue to suspend the functions of executive officers, and upon presenting his warrant of appointment according to section seventeen of the act establishing the said Board, he prays that the petition be dismissed.

There being no evidence in the record, except the commissions of the parties with defendant's oath of office, the question involved is one of the construction and effect of the laws relating to the two offices and the functions thereof in controversy.

By the twenty-sixth section of the amended city charter (acts 1856, p. 142) the Mayor of New Orleans was empowered to appoint police officers, policemen and watchmen, under the ordinances of the common council organizing the same.

Article 133 of the Constitution of 1864 gave to the citizens of New Orleans the appointment of the officers necessary for the administration of the police of the city, in the mode prescribed by the Legislature, and directed that the city should maintain a police selected by the Mayor, and removable by a commission appointed by the Governor, recognizing in express terms a chief of police and other officers, and fixing the grade of their salaries.

Act No. 14 of the Legislature of 1866 directed that after the ensuing municipal election the police of the city should be organized by an ordinance determining the number, functions, etc., of the same; authorized the Mayor to make the appointments, and provided for carrying into effect the above article of the Constitution, fixing, among other things, the composition and functions of the police commission, which, with the Mayor *ex officio* a member thereof, had the control of the police of the city. None of the city ordinances are before us.

The Constitution of 1868 omitted article 133 of that of 1864, but by article 149 continued in force all legislation not inconsistent with the Constitution itself. This left the whole subject of the city corporation and police under the power and discretion of the Legislature, which by act No. 1, approved July 9, 1868, created a Board of Police Commissioners, to be appointed by the Governor, and who shall have "full power to appoint and remove and control the officers and men of the police force of the city of New Orleans;" directed how the officers and men should be removed, and repealed all acts and parts of acts inconsistent therewith. This act took effect from and after its passage, and as a consequence, the laws *authorizing the Mayor to appoint the police, and creating a police commission, with the Mayor as a member, for the trial and removal of policemen, being inconsistent therewith, were repealed and all control of the police was taken from the Mayor and the said commission and vested in the board of five police commissioners, created by said act. No law exists authorizing the Mayor to make such appointment.*

The plaintiff however asserts this act No. 1 to be unconstitutional, because by the one hundred and fifty-ninth article of the Constitution of 1868, it is provided that the General Assembly at its first session shall not have power to enact any law until the fourteenth amendment to the Constitution of the United States "*shall have been acted upon.*"

We have the highest evidence that said amendment had been "acted upon," when the said statute was passed, for the joint resolution ratifying it was approved on the same day with the statute. Both required alike the action of each house and to be submitted to the Governor before they took effect. The Constitution does not say that the proposed amendment shall be adopted before the General Assembly could propose or consider any bill—it only says that it shall not *enact* any laws, that is, pass any bill through the necessary stages to become a

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law, until it had acted upon the amendment—the object being to secure early action thereon; and in our opinion the amendment was acted upon before any law was enacted in the constitutional sense. And we can see nothing in this statute in conflict with articles 42, 94, 117 and 118 of the Constitution, as charged.

The conclusion is evident that the Mayor was without legal authority to appoint plaintiff chief of police.

Subsequent legislation on the subject has, if possible, more effectually withdrawn and withheld the police of the city from the Mayor, (see acts Nos. 74 and 145 of 1868, and Nos. 60 and 92 of 1869); and the conclusion is manifest that the alleged appointment of the plaintiff as chief of police by the Mayor was without authority of law, and that in said capacity he has no right to the writ of *quo warranto* demanded in this proceeding.

It is not pretended that section 130 of the city charter, if in force, applies; and by act No. 156 of 1868, the party complaining must have an interest in the controversy and the proceeding must be in the name of the State.

Plaintiff having no interest in the office of chief of police or superintendent of the metropolitan police, cannot interfere with or restrain the defendant in the discharge of his alleged functions or question his right to the office, which plaintiff admits he holds under an “act to establish a metropolitan police district, and to provide for the government thereof,” approved September 14, 1868.

Admitting that this act, in the particular features mentioned, is in conflict with the Constitution, it does not invalidate the establishment of a metropolitan police and the appointment of a superintendent thereof, as provided for in the act. It is said the act violates article 117, because the Lieutenant Governor is made *ex officio* the president of the board with a salary, and article 118, because the tax authorized is to be assessed upon the portion of the State comprising the metropolitan police district only, which, if true, as said before, does not render the balance of the act unconstitutional.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of defendant dismissing plaintiff's demands with costs in both courts.

Nos. 1983 and 1982.—METROPOLITAN POLICE BOARD v. J. R. CONWAY.—Same v. R. E. DIAMOND.

REPORTER.—See the case of Diamond v. Cain, No. 1986, reported above.

APPEAL from Fifth District Court, parish of Orleans. Léaumont, J. J. Hawkins and E. Filleul, for plaintiffs and appellants. H. J. Leovy, R. N. Ogden and Alfred Philips, for defendants and appellees.

Metropolitan Police Board v. J. R. Conway. — Same v. R. E. Diamond.

HOWELL, J. These two cases present the same issues, and were instituted to prohibit John R. Conway, Mayor of the city of New Orleans, from commissioning and ordering on police duty any person or persons in said city, and the defendant Diamond from acting as Chief of Police in the said city, on the ground that the whole police power within the city of New Orleans is by law vested in the plaintiffs.

We have just found in the case of *Diamond v. Cain* that this ground is sustained by the law, and for the reasons assigned in said case, it is ordered that the judgments appealed from be reversed, and that there be judgment in favor of plaintiffs perpetuating the injunction in each case at the costs of the defendants respectively in both courts.

No. 2105.—STATE OF LOUISIANA v. THEOPHILUS W. EVANS.

In capital cases jurors are not permitted to separate after they have been sworn.
A verdict of guilty of a capital offense will be set aside, and a new trial ordered where the jury have separated after they were sworn and before verdict.
In cases not capital the jury may be allowed to separate at the discretion of the judge before verdict.

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APPEAL from the Eighth District Court, parish of St. Landry.
Bailey, J. E. D. Estilette, District Attorney, for the State.
George H. Wells, for defendant and appellant.

WYLY, J. The defendant was indicted, tried and convicted of murder.

He has taken this appeal.

Many irregularities in the proceedings, and a number of bills of exceptions to the rulings of the court, appear in the record.

After the verdict of the jury the accused moved for a new trial, for the reason that at least twice during the trial there was a separation of the jury, a part of them leaving the court room in each instance, and once during the introduction of the testimony for the defense. Both of said separations occurring without the permission of the court.

It appears from the bill of exceptions that the separation of the jury occurred after they had been sworn and during the introduction of the evidence.

This we regard as fatal to the verdict.

In capital cases the jury should not be permitted to separate after they have been sworn. This precaution protects them from the improper influence of designing men, and from the force of popular opinion.

In the case of the *State v. Hornsby*, 8 R. 554, this court said: "In cases not capital courts may, in their discretion, permit the jury to disperse until they have received the charge of the court; but they must not be permitted to separate after the charge has been given. In these cases, misconduct on the part of the jury will set their verdict aside; in capital cases, upon a separation, misconduct and abuse will always be presumed."

In the *State v. Crosby et al.*, 4 A. 435, the court said: "It is only in capital cases that jurors are not permitted to separate after being sworn. In cases not capital, it is discretionary with the judge to permit them to disperse until he has delivered to them his charge." The same doctrine has often been affirmed by the court.

Regarding the verdict as vitiated by the separation of the jury, we deem it unnecessary to pass on the points presented in the other bills of exceptions.

It is therefore ordered and decreed that the verdict and the judgment of the court thereon be avoided and annulled, and the case be remanded for new trial, and to be proceeded with according to law.

No. 1811.—JOSEPH AGUADER *v.* J. H. QUISH AND WIFE.

A deposited a lot of jewelry with B to be raffled, and afterwards gave C, a creditor of his, an order on B for the jewelry or its proceeds. Held—That this order did not establish either a sale or *dation en payment* of the jewelry, and that C cannot be considered as the owner.

A PPEAL from the Fifth District Court of New Orleans. *Léaumont, J. T. A. Bartlett*, for plaintiff and appelle. *H. J. Leovy* and *F. A. Monroe*, for defendants and appellants.

TALIAFERRO, J. This is a contest between opposing creditors, to be paid by preference of right upon property of the defendants held by the sheriff, subject to the judicial settlement of their respective claims. The plaintiff having obtained judgment against the defendants in November, 1867, soon after issued an execution, and cited one Clark as garnishee, and propounded interrogatories to him as to what property or money, if any, belonging to defendants he had in his possession, and more especially as to whether he held a certain lot of jewelry belonging to defendant's wife.

The garnishee answered that he had in his possession a lot of jewelry which he received from the defendant, J. H. Quish, and which was pledged to him to indemnify him against any loss that he might incur as indorser of two promissory notes, each for \$500, drawn by Quish, payable to the Southern Express Company.

The plaintiff made a seizure of the jewelry in the hands of the garnishee, but the sheriff's return shows that he did not get possession of the effects which he purports to have seized. The answers of the garnishee were traversed by the plaintiff, and pending the traverse the garnishee caused the express company to be made a party. The express company answered, adopting their allegations set forth in a petition previously filed in the same court, in which they prayed judgment against Clark for the amount of the notes executed in their favor by Quish and indorsed by Clark. They also prayed in their answer that they be decreed owners of the jewelry in controversy.

Joseph Aguader v. J. H. Quish and Wife.

Judgment was rendered in favor of the plaintiff, dismissing the claim of pledge by Clark, and that of ownership by the express company.

The express company appealed. The contest, so far as Clark was concerned, seems to have been abandoned, and it is now limited to the plaintiff and the express company.

The facts seem to be that in December, 1866, nearly a year before the plaintiff obtained judgment against the defendants, Quish placed some jewelry in the hands of Clark to be raffled. Soon after this, being largely indebted to the express company and pressed for payment, Quish gave the company an order on Clark for the jewelry or its proceeds. Small, an agent of the company, states as a witness that he presented the order (afterward mislaid, as he states, and not produced in evidence), to Clark in presence of Quish, and that the order was for the jewelry. He states that no objection was made to delivering the jewels, but that Clark and Quish both suggested that it would be better for the raffle to go on, and the proceeds paid over, as more could be realized by raffling the articles. To this Small assented, it being understood between all the parties that the jewelry, or if raffled, its proceeds, belonged to the company. Quish, in his testimony, states that the order was for the proceeds, and that no specific sum was stated, it being understood that whatever sum the jewels brought, whether five hundred or eight hundred dollars, it was to go to the company. Clark, in his testimony, says the order was for the jewels or the proceeds. In the suit of the company against Quish it is alleged in the petition that the order was for the proceeds. The only question is whether the company acquired the ownership of the jewels. We think that the evidence does not establish ownership. The transactions between the parties in regard to the jewelry or its proceeds do not seem to establish either a sale or a *dation en payment*. It is clearly shown that Quish was indebted to the company in an amount far exceeding the value of the jewels, after crediting him with the amount of the two notes, and with payments previously made. Yet there is no specified sum mentioned as agreed upon to constitute the price, nor was there a delivery. Civil Code, articles 2439, 2626; 12 L. 375; 10 L. 151; 3 An. 280.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs in both courts.

Citizens' Bank of Louisiana et al. v. Crooks & Maristany, Subrogated, etc., and M. Morgans, Sheriff.

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No. 2233.—CITIZENS' BANK OF LOUISIANA et al. v. CROOKS & MARISTANY, Subrogated, etc., and M. MORGANS, Sheriff.

A judgment creditor cannot sell under execution the buildings, seed cane, and mules placed on a sugar plantation separately from the plantation.

Where it is manifest from the record that the plaintiffs in injunction would be entitled to a new writ if the one which had issued were dissolved, the case will be remanded to enable the plaintiffs to supply the evidence omitted. 11 An. 546; 12 An. 92, 178; 18 An. 111.

APPEAL from the Fifth District Court of New Orleans. *Léaumont, J. A. Pitot* and *W. O. Denegre*, for plaintiffs and appellees. *Hornor & Benedict*, for defendants and appellants.

LUDELING, C. J. The Citizens' Bank of Louisiana obtained an injunction to prevent the defendants from selling "a sugarhouse and other buildings, seed cane and forty-six mules, attached to a plantation," which, it is alleged, is mortgaged in favor of the corporation for a large debt.

The reasons assigned for enjoining the sale are that the buildings, seed cane and mules on the place cannot be sold separately from the plantation. The defendants filed a general denial, and specially denied that the plaintiff had "any interest in or privilege on the property seized." They further alleged that the bank had not set forth any cause of action in the petition. There was judgment in favor of the plaintiff.

The bank offered in evidence the mortgage act and notes, but omitted to offer in evidence the execution and Sheriff's return therein. The defendants offered no evidence whatever, except the judgment against the common debtor.

The pleadings of the parties, the admissions in the defendants' brief, and the judgment of the District Judge make it probable that the property described in the petition was seized and advertised for sale as alleged. The buildings on a plantation, the seed cane and the mules placed there for the cultivation of the soil cannot be sold separately from the plantation. C. P. art. 645; act of 1843, p. 45; C. C. 455, 459. It is manifest that the plaintiffs would be entitled to a new writ if this injunction were dissolved. Under the circumstances, justice requires us to remand this cause to enable the plaintiffs to supply the evidence omitted. 8 M. 170; 6 An. 764, 778, 793; 8 An. 459; 11 An. 546; 12 An. 18, 92, 178; 18 An. 111.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that this case be remanded to the court *a qua* for further proceedings. It is further ordered that the appellee pay the costs of appeal.

Rehearing refused.

Walter L. Campbell v. Charles Waters and Mary A. Waters.

NO. 1594.—WALTER L. CAMPBELL v. CHARLES WATERS AND MARY A. WATERS.

Where a payment has been made on a promissory note which was given for the price of slaves, and a new note was executed for the balance due, the collection of the second note cannot be judicially enforced on account of the failure of consideration.

A PPEAL from the Fourth District Court of New Orleans. *Théard, J. Clark & Bayne*, for plaintiff and appellee. *Race, Foster & E. T. Merrick*, for defendants and appellants.

TALIAFERRO, J. The defendants are sued on a promissory note for \$3337 70, with interest at eight per cent. per annum from the thirtieth October, 1862. The defense is a failure of consideration, the note having been given for the payment of the price of slaves. The plaintiff meets this plea by contending that the original debt was novated, as shown by the defendants themselves. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

It appears that in April, 1860, the defendants purchased from plaintiff two slaves, at the price of \$3564, for which they executed their promissory note. Subsequently, in December, 1861, they paid the plaintiff six hundred dollars and executed a new note, the one sued on, for \$3337 70. This note was drawn payable to the commercial firm of Fellows & Co., and was by them indorsed; and it was further secured by a mortgage to them or to any future holder of the note, on the two slaves purchased from the plaintiff. It is evident that the new note was taken for the remainder of the price of the slaves, after the payment of six hundred dollars was made on the original note. The second note, the one sued upon, is therefore vitiated from the same cause that rendered null the first note.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendants, releasing them from all obligation to pay the note sued on, the plaintiff and appellee paying costs in both courts.

NO. 1789.—POLICE JURY OF THE PARISH OF JEFFERSON, LEFT BANK, v. THE HEIRS OF D. F. BURTHE and VICTOR BURTHE, Agent.

The Constitution of the State of Louisiana adopted in 1864, was provisional in its character, and the legislation had under it partook of the same nature.

The Convention that formed the Constitution of 1868, was competent to annul or continue in force any of the provisions of the Constitution of 1864, or the laws passed thereunder.

The act of the Legislature of the sixteenth of March, 1866, No. 122, exempting certain property from taxation during the war, was annulled by article 149 of the Constitution of 1868.

By the act of the Legislature of March 28, 1867, the assessment of taxes for the year 1860, and the consecutive years to 1864, inclusive, were extended until the first of January, 1870. Suits brought for the taxes on property for these years is therefore premature and must abate until the first of January, 1870.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Dugué, J. B. C. Elliott*, for plaintiff and appellant, *Victor Burthe*, for defendants and appellees.

Police Jury of the Parish of Jefferson, Left Bank, v. The Heirs of D. F. Burthe and Victor Burthe, Agent.

TALIAFERRO, J. This is an action to enforce the payment of certain taxes alleged to be owing the parish of Jefferson by defendants, who refuse to pay all that is claimed of them. They admit indebtedness for a portion of the taxes demanded, but aver that they are not legally bound to plaintiff for the taxes assessed against them for the year 1862, and the consecutive years to 1866, inclusive. The judgment of the lower court exonerated the defendants from the payment of the taxes for these years; rendering judgment in favor of the plaintiff for the amount of the taxes for the year 1861, three hundred and fifteen dollars, without interest, of which sum a tender had been made to plaintiff, who was adjudged to pay the costs. The plaintiff has appealed.

The plaintiff's claim is resisted on the ground that the property assessed was taken possession of about the middle of the year 1862, by the Federal military authorities, who converted it to various uses, and leased several of the tenements on said premises to different tenants from whom they derived a revenue sufficient to have paid the taxes now claimed from the defendants. That their property, the taxes on which they are now required to pay, was not delivered to them until some time in the year 1866. That they have in vain endeavored to obtain from the United States Government remuneration for the use of the property of which they were forcibly deprived. The defendants also allege that they are relieved from the payment of taxes for the year 1862, and the consecutive years to 1865, inclusive, by the act of the Legislature of the sixteenth of March, 1866, No. 122, page 234. On the part of the plaintiff it is held that the provisions of that act are unconstitutional inasmuch as they infringe the vested rights of the parish of Jefferson to levy and collect parish and municipal taxes for public purposes, and they further aver that said act of the Legislature is annulled by article 149 of the State Constitution of 1863.

It is moreover contended that this act of the Legislature of March 16, 1866, is violative of the provisional Constitution of 1864 (article 124), which declares that taxation shall be equal and uniform. The act it is held relieves a certain class of the people from the payment of taxes for four years and thus infringes that uniformity in the payment of taxes intended by the Constitution to be preserved. This objection is not without weight. The purpose of the act seems to have been to relieve from the taxes of four years those persons whose property had been seized and occupied for more than three months in any one year by United States military forces. The operation of the act would be clearly unequal. Hundreds of people of the State have been forcibly deprived of the use of their property, especially during the years 1863 and 1864, by United States military forces without their occupancy of such property for even a week.

Police Jury of the Parish of Jefferson, Left Bank, v. The Heirs of D. F. Burthe and Victor Burthe, Agent.

In the case where plantations were destroyed by the burning of the buildings, fencing, etc., upon them, it was rendered entirely impracticable for the owners to reside upon and cultivate them. It is matter of history and public notoriety that very many of the people of this State under such circumstances and within the arena of active warfare were compelled to abandon altogether their plantations and homes, and seek at a distance from the seat of war, temporary places of abode until the restoration of peace. And yet under the act in view persons in this category are not exempted from the payment of the taxes of the years 1862, 1863, 1864 and 1865, because their property was not occupied by United States military forces for more than three months in any one year; when the reasons for their exemption are as strong as in the case of those who are relieved, and which establish the principle upon which the relief is extended. This is however a law not assessing a tax, and we do not consider it in contravention of the constitutional provision referred to.

The Legislature of 1866 derived its authority to enact laws from a State government not recognized itself to be a legal State government. That State government was provisional only and liable at any time to be altered, modified or abolished by the Congress of the United States. The enactments of a Legislature deriving its authority from so infirm a source necessarily partook of the same provisional character, and their validity was contingent upon any action that might subsequently be taken in regard to them by the General Government acting through the military authority established in 1866, and which was paramount pending the re-establishment of a valid State Government. To the people of the State this paramount jurisdiction passed on the adoption of the Constitution of 1868, and its subsequent approval by Congress; and they were competent, speaking through that Constitution, to ratify or annul the legislation of the antecedent provisional State Government or any portion of that legislation. By the one hundred and forty-ninth article of the Constitution, the act of the Legislature of sixteenth of March, 1866, No. 122, page 234, was invalid. The plea of the defendants that they are exonerated by that act from the payment of parish taxes for the years 1862, 1863, 1864 and 1865, will not avail them.

By the act of the Legislature of March 28, 1867, the assessment and collection of taxes for the year 1860, and the consecutive years to 1864, inclusive, were extended to first of January, 1870. The suit brought by plaintiff to enforce the payment of the taxes for these years is therefore premature and must abate, the defendants not being bound by law to pay these taxes before the expiration of the term granted to them. The defendants admit their indebtedness for the taxes of 1861, and aver that they tendered plaintiff the sum of \$315 in payment, which was refused. They claim that this tender of payment relieves them from the payment of interest and costs.

Police Jury of the Parish of Jefferson, Left Bank, v. The Heirs of D. F. Burthe and Victor Burthe, Agent.

For the reasons assigned it is ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; that the proceedings taken by plaintiff against the defendants to enforce the collection of taxes for the years 1861, 1862, 1863 and 1864, be and the same are hereby annulled and set aside as premature, reserving to the defendants the benefit of their plea hereafter of tender of payment of the taxes for 1861.

It is further ordered, adjudged and decreed that the plaintiff recover from the defendants the amount of taxes claimed in the petition for the year eighteen hundred and sixty-five, to wit, the sum of three hundred and forty-two dollars and thirty cents, with eight per cent. interest per annum from the first of January, 1866, until paid and three dollars cost of recording tax bills with privilege upon the property assessed.

It is further ordered that defendants pay costs of the lower court and plaintiff those of appeal.

Rehearing refused.

No. 1788.—POLICE JURY OF THE PARISH OF JEFFERSON, LEFT BANK,
v. THE METAIRIE RACE COURSE ASSOCIATION.

See the case No. 1789, reported above.

APPEAL from the Second Judicial District Court. *Dugué, J. B. C. Elliott*, for plaintiff and appellant. *H. D. Ogden*, for defendants and appellees.

TALIAFERRO, J. This case presents substantially the same issues as those in the case of the same plaintiff against Burthe et al., just decided, except that in this case suit is brought for the parish taxes for the year 1866.

The case being considered, it is ordered, adjudged and decreed that the judgment rendered in this case by the District Court be annulled, avoided and reversed. It is further ordered, in relation to the taxes sued for for the years 1861, 1862, 1863 and 1864, that the suit abate for the reasons assigned in the case of the plaintiff v. Burthe et al.; that plaintiff recover from defendants the sum of seventy dollars, amount of taxes for the year 1865, with eight per cent. interest from first January, 1866, and seventy-five cents costs of recording tax bill. Also, that plaintiff recover the further sum of eighty dollars, amount of taxes for the year 1866, with interest thereon from the first January, 1867, and seventy-five cents costs of recording tax bill. The plaintiff's right of lien and privilege upon the property assessed is hereby recognized.

It is ordered further that defendants pay all costs of suit.

Rehearing refused.

Police Jury of the Parish of Jefferson, Left Bank, v. L. F. Foucher.

No. 1790.—POLICE JURY OF THE PARISH OF JEFFERSON, LEFT BANK,
v. L. F. FOUCHER.

See the case No. 1789, reported above.

APPEAL from the Second Judicial District Court. *Dugué, J. B. C. Elliott*, for plaintiff and appellant. *E. Bermudez*, for defendant and appellee.

TALIAFERRO, J. This case presents substantially the same issues as those in the case of the same plaintiff v. Burthe et al., just decided.

For the reasons stated in that case, it is ordered, adjudged and decreed that the judgment of the District Court rendered in this case be annulled, avoided and reversed. It is further ordered that the suit abate as to the demand of payment of the taxes claimed for the years 1863 and 1864; that plaintiff recover from defendant the sum of six hundred and twelve dollars fifty cents, amount of taxes for the year 1865, and the further sum of one hundred and ten dollars and ten cents, assessed to defendant for levee repairs for the same year, with eight per cent. interest on said sums from the first January, 1866, and one dollar fifty cents costs of recording tax bills, with lien and privilege on the property assessed.

It is further ordered that defendant pay costs in both cases.

Rehearing refused.

No. 1547.—FRANCIS M. FISK v. J. M. MOSS.

Where the appeal is taken in open court, citation of appeal to the appellee is unnecessary. *C. P. 573.*

A motion to dismiss the appeal for want of a proper bond will not be noticed by the Supreme Court, if not made within three judicial days from the filing of the record. 12 An. 350.

APPEAL from the Fourth District Court of New Orleans. *Théard, J. T. A. Bartlette*, for plaintiff and appellant. *A. Canonge*, for defendant and appellee.

LUDELING, C. J. The appellee has moved to dismiss this appeal on two grounds:

First—Because there is no citation.

Second—Because there is no bond.

The appeal was taken in open court, at the same term at which the judgment was rendered. This dispensed with citation. Art. 573 C. P.

The objection to the bond cannot be noticed, as the motion to dismiss was not made within three judicial days after the record was filed. 2 An. 138; 3 An. 326; 11 An. 613; 12 An. 350.

On the day fixed for the trial of the cause the plaintiff failed to appear, after having been called according to law, and the District Judge dismissed the suit, on motion of the defendant. We perceive no error in the judgment.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, and that appellant pay costs of appeal.

Rehearing refused.

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No. 6847.—MOLONY BROTHERS & Co. v. RUGELEY, BLAIR & Co.

Where all the facts are spread upon the record, the Supreme Court will not take into consideration the charge of the judge *a quo* to the jury. 6 Martin, 428.

APPEAL from the Fifth District Court of New Orleans. *Eggleston, J. Durant & Hornor*, for plaintiffs and appellees. *Clark & Bayne*, for defendants and appellants.

Howe, J. The plaintiffs alleged that on the twentieth March, 1858, they bought from defendants about 33,000 sacks of salt, represented by defendants as stored at the Brooklyn Warehouse, in Algiers, and as being the cargoes of the ships *Spark of the Ocean*, *Bamberg*, *Simoda* and *Courier*. They averred that 11,880 sacks of this salt were not in the warehouse at the time of sale, and were never delivered to plaintiffs, and therefore claim to recover back the price paid for this amount, the insurance paid by them, and damages for non-delivery.

The defendants answered, admitting the sale, and averring "that they fully performed all their duty in reference to said sale, and made due delivery according to the custom of merchants and the requirements of law, and that plaintiffs accepted said delivery and acknowledged the same."

The plaintiffs subsequently filed a supplemental petition, claiming the value of the cargo of the ship *Bamberg* with damages, the right to sue for which had been reserved in the original petition, on account of this cargo being involved in litigation with other parties in the Fourth District Court, and for which they averred that they had paid the defendants the sum of \$7714 40.

To this the defendants filed a general denial.

The case was tried before a jury, who found a verdict for plaintiffs. A motion for a new trial was overruled, and judgment rendered in favor of plaintiffs, and the defendants have appealed.

Our attention is just called to the bill of exception in the record.

In regard to the cargo of the ship *Bamberg*, which the defendants failed to deliver, and which was involved in the litigation which is fully reported in 14 Annual, pp. 394, 395, the defendants sought to prove that the contract in the shape of a sale to Leland from Casey & Co. of this cargo was in reality a pledge. The court refused to permit this, on the ground of irrelevancy, and we think correctly. Whether this cargo was pledged or sold to Leland, it could in neither case have been delivered to plaintiffs. It was adjudged by this court to Leland; defendants never delivered it to plaintiffs; the plaintiffs never obtained it.

The defendants sought to prove by Ellis that the salt in question was in the warehouse in December, 1857. We do not think the court erred in refusing to permit this proof to be made.

The question before the jury was whether the salt was there on the twentieth March, 1858, at the time the sale was made, and the property represented to be there by the defendants as vendors.

Nor do we think the court erred in refusing to permit C. S. Martin to be examined as a witness for defendants. He was a member of the firm of Casey & Co., the warehousemen, who were responsible for the salt, and were interested to show that the salt was really in the warehouse on the twentieth March, 1858, according to their receipts. As the law stood at the time of the trial (1860) he was clearly incompetent on the ground of interest. See Greenleaf on Ev. § 392 to 403, and cases cited.

The defendants also excepted to certain points in the charge of the judge *a quo*, but we do not find it necessary to pass upon these exceptions. The case is before us on its merits. The record clearly shows that the plaintiffs purchased the salt and paid the defendants for it the price agreed to be paid; that the defendants, as the plaintiffs charge, did not deliver the amounts sued for, and are liable for the sum accorded by the judgment. It would be fruitless to discuss the ingenious objections of the defendants to the charge of the court, when the case is plainly with the plaintiffs in the evidence, and the verdict is fully justified thereby. No improper evidence was received—no proper evidence was rejected. In *Maurin v. Tostin*, 6 Martin 493, this court said: "It is useless for us to take into consideration the propriety of a charge of an inferior court to the jury, when the whole facts are spread upon the record. For, to send back the cause for a new trial with directions to withhold a part of the charge excepted to, or to give another would be productive of delay only; as upon a new appeal whatever might be the verdict, unless it was a special one, it would be our duty to weigh the evidence as if there was no verdict." See also 4 M. 327; 7 N. S. 198; 4 La. 76.

The language of the eminent judge whom we have just quoted, applies with special force to the case now before us, which was tried about nine years ago.

For the reasons given, it is ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 1488—JAMES NELLIGAN v. THE CITIZENS' BANK OF LOUISIANA.

The military orders issued to the banks of New Orleans during the late war directing them to make a statement of such deposits as belonged to officers of the army of the Confederate States, and directing them to pay over to the proper officer of the Quartermaster's Department of the United States all moneys in their possession belonging to or showing upon their books to the credit of such persons, was an attempt on the part of the military authorities to sequester these funds.

A Bank cannot be relieved from paying a deposit to the proper owner on the ground that it has paid over the amount of the deposit in Confederate treasury notes to the Quartermaster of the United States army, under military orders, unless it is shown that the deposit was made in the bank in Confederate money with the knowledge of the depositor.

The sequestration and taking possession of Confederate treasury notes by the military authorities of the United States, which the banks of the city of New Orleans had given over as the deposits of officers engaged in the rebellion, did not amount to a sequestration by the United States of the credits of said parties, against the banks.

Confederate notes having been issued in violation of law, and against good morals and public policy, could not form the basis of a seizure or sequestration so as to exonerate the banks from liability to their depositors.

A PPEAL from the Fourth District Court of New Orleans. *Théard, J. Breaux & Fenner*, for plaintiff and appellant. *Armand Pitot*, for defendants and appellees.

Howe, J. The plaintiff sues for thirty-five hundred dollars, the amount of a deposit made by him in the bank of defendants on the fourth January, 1862. The defense set up in the answer is that the amount of the plaintiff's deposit was paid over to the quartermaster of the United States army on the twenty-third August, 1863, at New Orleans, in pursuance of military orders, as the funds of an officer in the rebel army, a receipt taken and the defendants thereby discharged from all liability.

There was judgment for defendants and plaintiff has appealed.

It appears by the evidence that at the time stated in the answer, the defendants, in what they claim to have been a compliance with military orders, delivered to Captain J. W. McClure, acting quartermaster, the sum of thirty-five hundred dollars, in Confederate notes, as the balance of deposit due to plaintiff. We are of opinion that, to enable them to successfully urge this fact as a defense to the demand of the plaintiff, they must show that the deposit made by the plaintiff was made in Confederate notes. The military orders were intended to sequester property.

The first, of date August 7, 1862, directed the banks to make a statement of such deposits as belonging to officers of the army of the Confederate States (among other classes of persons), and to hold the same till further action. The second order, of date August 17, 1863, directed the banks to pay over to the proper officers of the quartermaster's department all moneys in their possession belonging to or standing upon their books to the credit of the same classes of persons. By an official communication of August 20, 1863, the commanding general declared "the transfer of these balances from the banks to the officers

of the government is not in the light of an absolute forfeiture." Clearly, then, the military authorities attempted to sequester. If in this case that attempt was successful, the plaintiff has no claim. But if the attempt was abortive the defendants can hardly with good grace complain of the plaintiff's good fortune. Now, whether the sequestration was actually made will depend on the solution of the question of fact whether the defendants received Confederate notes on deposit, from plaintiff, or lawful money.

If the deposit was made in lawful money, we cannot perceive on what principle of law or equity the defendants could discharge themselves from liability to plaintiff by the delivery to the quartermaster of Confederate notes proved in this case.

It is however contended with much vigor by defendants that if the United States government is satisfied with this so-called payment, the plaintiff is without interest to complain; that his claim was confiscated, and even if the bank did not pay over what it had received as a deposit, it is for the government, and not for the plaintiff, to make further demand, and upon this point they refer to the case of *Manderville v. the Bank of Louisiana*, 19 An. 392.

That case does not properly support those views. There, a real payment of the amount of plaintiff's deposit had been made to the quartermaster, in lawful money; and the court declared that this payment necessarily released the bank. In other words, the sequestration was actually made. But the delivery of Confederate notes in discharge of an obligation arising from a deposit of lawful money is not a payment, without the consent of the creditor; nor would such delivery be a compliance with an order to turn over the balance of such a deposit to the quartermaster. If under such circumstances the quartermaster received Confederate notes only, he failed to obtain what he was trying to obtain—the defendants failed to give up to him what they ought to have given up.

We find it necessary to inquire, then, in this case, whether the defendants have shown as part of their defense that the deposit by plaintiff was made in Confederate notes.

Upon this point the plaintiff's testimony is substantially as follows:

"I went to the bank on the fourth January, 1862, and as I got inside the door, I was stopped by Mr. Denégre, president of the bank. I was asked by him how his son was, and he invited me into his room on the left hand side of the entry. He asked me if I was going to make a deposit. I had in my possession at the time, the check marked 'A' and some money. I do not now recollect but what Mr. Denégre took my money and check, and had the entry made in the bank book marked 'B,' and returned the book to me with the entry made in it. I handed the check and money to Mr. Denégre, and he had the entry made. I will not be positive as to Mr. Denégre making the deposit for me; but

am positive the check marked 'A' and four hundred or five hundred dollars which I had in my pocket, constituted the deposit made. *We had no conversation in regard to Confederate money.* The check marked 'A' was received from Mr. Gerard Farrell for money loaned by me to him *before the war.* My object in drawing the money and depositing it in bank was *to put it in a place of safety.* I left the next day for Virginia, and considered it in a place of safety. I had nothing more to do with the matter until after the war. When Farrell gave me the check he did not say anything about Confederate money. I supposed it to be the same as I had loaned him." * * *

Cross Examined.—* * * "I was only here three days in 1862, and cannot say what the currency was at the time. All the transactions I had were in gold: I can't say whether the money I gave to Mr. Denégre was in gold, Citizen Bank notes, or what kind it was. I was not long enough in town to find out the currency then prevailing. When I went to Virginia I took one thousand dollars in gold, and when I came back I brought back five hundred dollars. I can't say what the value of Confederate currency was. In 1862, when I was in Norfolk, Virginia, gold and silver were current. * * Where I was, I saw more gold and silver than Confederate money. I did not look into the bank book when Mr. Denégre returned it to me." Being asked, "were you not surprised in finding the words *current funds* instead of *cash* written in the book?" says: "I never paid any attention to it; not being accustomed to banking business, I trusted the officers."

The check referred to in this testimony is an ordinary bank check, drawn by Gerard Farrell on the defendants, for \$3,294 90.

John G. Gaines, for defendants, testified that the currency of the country at that time was Confederate States treasury notes; that any check drawn on the bank, unless otherwise specified, would be paid in Confederate money; that Farrell's check was payable and would have been paid in Confederate money; that from September, 1861, it was understood with depositors that all checks were payable in Confederate money, unless there was a special deposit, and that there was no special agreement with Mr. Farrell as to the payments of his checks. "In most of the bank books," continues this witness, "a printed notice was posted notifying all depositors that all deposits made or checks drawn would be in Confederate money. The omission to post the notice in the book marked 'B' [the plaintiff's bank book], was through error or mistake. Whenever the notice was omitted it was done so through error." The bank book of Farrell was put in evidence by defendants, and from that it appears that on the sixteenth September, 1862, the depositor, Farrell, had a balance in the bank of \$7481 17, in lawful money. This balance does not appear to have been reduced at the time the check to plaintiff was drawn.

It will be perceived at once that this case differs from that of Erwin's

James Nelligan v. The Citizens' Bank of Louisiana.

Executors v. Bank of New Orleans, lately decided, and resembles in some important features the case of *Weaver v. Anfoux*, 20 An. p. 1.

The plaintiff for a loan of lawful money receives the check of Farrell, drawn upon a bank in which Farrell has a large deposit in lawful money. Farrell does not inform plaintiff that the check will be paid in Confederate notes. The check does not convey any such idea. The officers of the bank in receiving it on deposit and giving the plaintiff credit for the amount do not so inform him. We find no reason in this record to doubt his statement that he supposed it to call for the same kind of money that he loaned Farrell before the war. As for the balance of the deposit there is no evidence to show that it was other than lawful money.

From the evidence as a whole we conclude, that the defendants on whom the *onus* was under the pleadings, have not established that this deposit was made in Confederate notes, and that therefore proof of the delivery of \$3500 of such notes to the quartermaster, did not establish a discharge of the liability of the defendants.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed, and that the plaintiff have judgment against the defendants for the sum of thirty-five hundred dollars with legal interest thereon from September 1, 1865, until paid, and costs in both courts.

Rehearing refused.

No. 1542.—WIDOW ALINE BOULIN v. JAMES RAINEY.

Credits on the back of a promissory note to be evidence against the maker must be shown to have been placed there with his knowledge and consent.

The plea of general denial only admits the signature on the face of the note. An agreement on the back of the note, signed by the maker, does not form a part of it, and is not admitted by the general denial.

A PPEAL from the Sixth District Court of New Orleans. *Duplantier, J. Jerome Meunier*, for plaintiff and appellee. *Randolph & Singleton*, for defendant and appellant.

LUDELING, C. J. This suit is instituted on two promissory notes—one for five hundred and ninety dollars and seventy-three cents, due fifteenth of March, 1864; the other, for the sum of three thousand three hundred dollars, due twelfth of March, 1860.

The plea of prescription has been filed in this court.

Citation was served on the defendant in this case on the seventh of May, 1867.

The note for five hundred and ninety dollars and seventy-three cents is not prescribed. The other note is prescribed on its face. But it is contended by the plaintiff that the payment of the note was prorogated by agreement with defendant and that partial payments were made at different times as appears from the indorsements on the back

Widow Aline Boulin v. James Rainey.

of the note, and thus prescription was interrupted. These memoranda were not proved or offered in evidence, and although they might be proof against the party who had possession of the note, if offered in evidence, they prove nothing against the defendant, unless it be established that they were written by him, or with his knowledge and consent, or at least that the credits were given before prescription had accrued and at a time not suspicious. 12 An. 83, 661.

The renewal on the back of the note, purporting to have been signed by the defendant, was not offered in evidence—*non constat*, that if it had been, the defendant would not have objected to it and denied his signature. His general denial *admitted his signature to the note only*. We do not consider the agreement on the back of the note a part of it.

We do not regard this case as coming within the rule announced in *Maxwell v. Kennedy*, 10 An. p. 793.

The plaintiff has asked us to remand the case if we considered the plea of prescription well founded.

It is therefore ordered, adjudged and decreed that the judgment of the lower court in favor of the plaintiff for the sum of five hundred and ninety dollars and seventy-three cents, with eight per cent. per annum interest from the twelfth of March, 1863, be affirmed, and that in other respects it be avoided and set aside. It is further ordered that this cause be remanded to the District Court to be tried on the plea of prescription, and that the defendants pay the costs of the District Court, and that the appellee pay costs of the appeal.

NO. 2063.—STATE OF LOUISIANA, on the relation of A. HERO, JR., v. ARMAND PITOT, JR.

Where the transcript of appeal is duly certified by the clerk of the District Court as containing all the evidence, etc., adduced on the trial, it is sufficient to enable the Supreme Court to decide the case on its merits and the appeal will not be dismissed. 20 An. 213.

The affidavit of the appellant that his interest in the controversy exceeds five hundred dollars is sufficient to give the Supreme Court jurisdiction of the appeal.

The right to an office can not be inquired into or tested under existing laws on an application for a writ of *mandamus*. *Sternberg v. Legard*, ante page 18.

APPEAL from Seventh District Court, parish of Orleans. *Collens, J. Hornor & Benedict*, for relator, appellant, *Charvet & Duplantier* and *E. Bermudez*, for defendant and appellee.

WYLY, J. Defendant and appellee moves to dismiss this appeal because the record does not show a note of evidence, statement of facts, bill of exception or assignment of errors, and because the interest of the plaintiff in the matter in dispute does not exceed five hundred dollars.

The clerk of the District Court has certified that the transcript filed in this court contains a true and correct copy of "all the proceedings had, documents filed and evidence adduced on the trial," and this suffices to enable this court to consider the case and decide it on its merits. 20 A. 213.

State of Louisiana, on the relation of A. Hero, Jr., v. Armand Pitot, Jr.

The appellant has filed in this court his affidavit that the matter in dispute and his interest therein exceeds five hundred dollars.

The matter in dispute is the possession of certain notarial records in the hands of the defendant, which the relator as custodian of notarial records of the parish of Orleans, under act affirmed twenty-eighth March, 1867, sues to recover. His interest in said records is the fees he is entitled to by said act for certifying copies thereof. His affidavit establishes that his interest therein exceeds five hundred dollars, which gives this court jurisdiction.

The motion to dismiss is therefore overruled.

ON THE MERITS.

This is a proceeding by mandamus to recover the records of a notary public who is alleged to be no longer an officer.

The relator, as custodian of notarial records of the parish of Orleans, claims to be entitled to the records in possession of the defendant by virtue of the third section of the act of twenty-eighth March, 1867, which provides "that it shall be the duty of said custodian of notarial records to collect together and safely keep in his possession the records of all notaries in the parish of Orleans who shall have ceased to be such, either by death, removal or otherwise, except such records as are already in the custody of other notaries." * * Acts 1868, p. 231. He alleges that the defendant, A. Pitot, Jr., has in his possession and custody the acts and other instruments of writing passed before him as notary public in and for the parish of Orleans; and that he is not now a notary public by reason of not having the consent of the Senate to his appointment; also because his appointment to office under the Constitution of 1864, ceased by virtue of the organization of the government under the Constitution of 1868.

He avers that said Pitot claims to exercise the functions of a notary and unlawfully detains the notarial records in his office.

The defendant appeared and excepted on the ground that the proceeding by mandamus is illegal; that the relator has no cause of action against him; that he is a duly qualified and commissioned notary public in the parish of Orleans, not having resigned or been removed, and that he is entitled to retain possession of the papers, documents and other effects belonging to his office.

The only evidence we find in the record is the commission of the relator as custodian of notarial records and his oath of office, dated sixth October, 1868, and the commission and oath of office of the defendant as notary public, bearing date fifteenth April, 1867.

From a judgment dismissing his petition the relator has appealed. The right of the relator to recover the object he seeks depends on the

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solution of the question whether or not the defendant is entitled to his office as notary public. If the allegations of the defendant be true, that he is a duly qualified and commissioned notary, lawfully in the discharge of his official duties there is no cause of action against him. He is entitled to the papers and documents belonging to his office.

If, on the other hand, his term of office has ceased because of his appointment not having been confirmed by the Senate, or because of the operation of the one hundred and fiftieth article of the Constitution of 1863, the relator has a cause of action, and can claim the records confided to his custody by law.

The relator bases his claims on the ground that the defendant has ceased to be an officer, and it is his duty under the act of twenty-eighth March, 1867, to take the custody of the records of his office.

We can not determine the rights of the relator in the premises without deciding upon the right of the defendant to the office of notary public. This we can not inquire into in a proceeding by mandamus.

In the case of the State in the relation of Sternberg v. Legarde, lately decided, we held that "the right to an office can not be tested under existing laws on an application for a writ of mandamus." We still adhere to that opinion.

The right of the defendant to the office of notary public can be tested under the act of the fifteenth of October, 1868, re-enacting "an act providing a remedy against usurpations, intrusion into or the unlawful holding or exercising a public office or franchise in this state." Acts 1868, 199. In a proceeding under said act the questions involved in this case might be determined, but as they are now presented they can not be entertained and considered.

It is therefore ordered that the judgment of the court below be affirmed with costs.

Rehearing refused.

No. 1454.—FOSTER & McALLISTER, Erwin's Executors, v. BANK OF NEW ORLEANS.

A deposit in the Bank of New Orleans in 1862, in checks and drafts, drawn by the Union Bank of Nashville, and by citizens of Tennessee, during the time that Confederate Treasury notes were shown to be bankable funds in New Orleans and Nashville, must be considered as having been made in such funds.

A depositor of funds in Confederate Treasury notes, while such notes were shown to be bankable funds, cannot recover, from the bank in money, the amount so deposited.

Where a party purchased checks drawn by one bank on another, and drafts drawn by one party on another, all within the Confederate lines at the time, and paid for them in Confederate Treasury notes, he must be considered as *particeps criminis* in giving credit to that currency and is without the capacity to obtain the enforcement of any contract or obligation growing out of such transactions.

A PPEAL from the Fourth District Court of New Orleans. *Theard, & Breaux & Fenner*, for plaintiffs and appellees, *William H. Hunt* and *L. Castera*, for defendant and appellant.

Foster & McAllister, Erwin's Executors, v. Bank of New Orleans.

TALIAFERRO, J. The plaintiffs as executors, the one of James Erwin, Sr., the other of James Erwin, Jr., bring this suit to recover from the Bank of New Orleans the sum of twenty thousand dollars with legal interest thereon from the twenty-seventh day of February, 1862. They allege that at that date the Bank received for account of the firm of James Erwin & Son, twenty thousand dollars, which it has failed to pay over or to account for.

The answer is a general denial. The defendant admits that it did receive about the twenty-fifth of February, 1862, from James Erwin & Son, two checks drawn upon it by the Merchants' Bank of Nashville, one for \$3000, the other for \$4000, and also four drafts amounting in the aggregate to \$13,000, drawn upon William Conner & Co. The proceeds of the whole, making \$20,000, they ever were placed on the books of the Bank to the credit of James Erwin & Son in funds then bankable, that is, in Confederate money which at that time they allege was the only currency used in commercial dealings in New Orleans. The defendant further sets out that from the circumstances under which the transactions took place between James Erwin & Son and the defendant, it was authorized to receive and pay back Confederate money to them which it has always been and is now willing to do. The defendant further pleads in bar of this action that the plaintiffs' pretended claim is based on a contract, the consideration of which was Confederate money, an illicit currency gotten up to sustain the late rebellion against the United States Government, and the contract being against public order and policy is null and void.

In the court below the plaintiffs had judgment for \$20,000 with legal interest from the tenth of July, 1863. The defendant has appealed.

On the twentieth of December, 1861, James Erwin & Son, of Nashville, purchased from the Merchants' Bank of that place, two checks, one for \$3000, the other for \$4000, drawn on the Bank of New Orleans in the following form :

“\$3000. Merchants' Bank, Nashville, Tenn.,
In Bankable funds,
Pay to the order of James Erwin three thousand dollars. To Bank of
New Orleans, New Orleans, La.

H. C. SHAPARD, Cashier.

No. 9833.”

The four checks or drafts on Conner & Son, were purchased by the Erwins in Nashville, from the Traders' Bank of that place, on the twentieth of December, 1861, and they, in like manner, with the checks upon the Bank of New Orleans bought at same date, were drawn payable in “bankable funds,” Conner & Son in payment of the checks drawn upon them, gave their own check upon the Bank of New Orleans. Its amount was charged to Conner & Son, and passed to the credit of James Erwin & Son. The same thing was done in relation to the checks drawn by the Merchants' Bank of Nashville.

The plaintiffs argue that neither the checks upon the bank nor upon Conner & Son, were collected in Confederate money. That Confed-

erate money was not received for Erwin & Son, nor authorized to be received by them, and that nothing appears to connect the Erwins with any transaction in Confederate money throughout the whole business, that the Bank on receipt of the checks informed the holders, through its cashier, that it was in receipt of their letters of sixteenth and twenty-third of December, 1861, "with twenty thousand dollars, which as requested, have been placed to the credit of James Erwin & Son."

It is shown that at the time these several checks were purchased, and afterwards when their proceeds were placed to the credit of the Erwins, Confederate money was bankable funds both in Nashville and New Orleans; that Conner & Son knew when they gave their check to pay those drawn upon them, that it would be paid in Confederate money. The testimony in the record renders it clear beyond a reasonable doubt that the so-called Confederate money was the exclusive, the only currency at that time in New Orleans. All business operations were carried on in that currency. Nobody expected to pay or be paid in any other money. The president of the Bank of New Orleans at that time testifies that from the time of the suspension of specie payments, sixteenth of September, 1861, the banks of New Orleans, including that of which he was president, received and paid out Confederate notes—all other notes, he adds, gradually disappeared from circulation; that on the first day of January, 1862, payments in the Bank of New Orleans were made in Confederate money. That it was then universally used in the payment of debts due to banks; that it was universally recognized in New Orleans as money; that it was bankable; that it was generally known and understood among the dealers of the Bank of New Orleans that checks on it would be paid in Confederate money; that notices were placed by the bank in the bank books of depositors that checks on it would be paid in Confederate money, and that that was the general understanding.

Another witness, a director of the same bank at the time referred to, corroborates the statement of the president in regard to the notices given to depositors, and says that the instructions to the officers of the bank were to give notice in all cases to depositors that the bank would pay checks on it in Confederate money, and that depositors would be required to receive the same currency deposited by them. He states that by the twenty-fifth of February, 1862, every bank in New Orleans had given the same notices. His testimony is to the same effect as that of the president as to the exclusive and universal circulation of Confederate money in New Orleans at that period.

Another witness, at the time in view, a note clerk of the Bank of New Orleans, and subsequently cashier of the bank, corroborates fully the testimony of the director. He says that the firm of James Erwin & Son never had any transaction with the Bank of New Orleans, except the solitary one out of which this suit has arisen. He shows that the funds placed by the bank to the credit of the Erwins were Confederate money, that the twenty thousand dollars deposited in

court (meaning the Confederate money to the credit of James Erwin & Son), he found in the Bank of New Orleans when he took charge of its funds.

Other witnesses confirm to a great extent the testimony we have detailed. All the witnesses concur in declaring the universality of the use at that time in New Orleans of Confederate money. They establish most conclusively that it was the only currency; that it entered into all commercial operations, that by it alone all banking business was carried on; all deposits made in all the banks were made in Confederate money. All money paid out by the banks was Confederate money; in short that every kind of trade, occupation and business carried on, used Confederate money as a medium of exchange. Finally that every species of negotiation whatever entering into the mercantile pursuits of the time and into the every day pursuits of life was performed through Confederate money as the sole medium of exchange, because the business purposes of the community could not otherwise have been accomplished.

It is in proof distinctly that at the time the Erwins bought the checks from the Nashville banks, Confederate money was bankable in Nashville, and it is also fully established that they gave for those checks either Confederate money or bank notes of Tennessee banks in good credit. It is a matter of history that at the period of these transactions specie payments were every where suspended throughout the so-called Confederate States. From the broad array of evidence spread out in the record we think the following deductions are legitimate and leave no reasonable doubt upon the mind and conscience of their truth. That the large sum forming the object of the adventure and the mode of the negotiation, imply that the Erwins were capitalists, conversant with money transactions, acquainted with the state of exchange and having a competent knowledge of the character and condition of the currency and of the banking operations going on at the time within the large range of their business.

That they paid for the checks they forwarded for collection to New Orleans either in Confederate money or in the notes of Tennessee banks, which nothing warrants us in believing were then in any better credit than Confederate money. Hence it results, that the probability is just as strong that they used Confederate money in the purchase of the checks as that they did not. That their implied knowledge of the course of trade and business at that day, negative the idea that they were ignorant of the kind of money the Bank of New Orleans was receiving and paying out at the time they forwarded their checks to that Bank, and this without any notice to that effect from the bank, although the evidence raises at least, a reasonable probability that they had such notice from the Bank. That under the existing state of facts, of which the inference is not admissible that they were ignorant, they tacitly and impliedly assented to receive in payment of their checks Confederate money, because Confederate money at that time

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constituted bankable funds in New Orleans. This deduction derives greater force from the fact that they gave no instructions whatever as to what kind of money they expected or required in payment of their checks.

That when they received the letter from the cashier of the Bank of New Orleans, saying: "I am this day in receipt of your favors of the sixteenth and twenty-third inst., with \$20,000, say twenty thousand dollars, and which as requested have been placed to the credit of James Erwin & Son," they neither expected nor had they a right to expect that they would receive the twenty thousand dollars in anything but Confederate money.

That the force of the aggregate testimony in the record is such as to leave no reasonable doubt upon the mind of the complicity of the Erwins in these transactions in the illicit paper money called "Confederate money," and at this late day it would be against law and conscience to permit their executors to retrieve their losses from the ill omened currency by extorting from the coffers of the bank near thirty thousand dollars in legal currency.

That the Erwins chose to deal with those who were trading in an illegal paper currency and to accept their conditions. They were therefore in the matter of giving credit to that currency *particeps criminis* and entitled to no relief from this court, which has often announced that it will not entertain suits to enforce contracts reprobated by law and public policy.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that this suit be dismissed, and that the plaintiffs and appellees pay costs in both courts.

Rehearing refused.

No. 1589.—CALDWELL & SHANNON v. NEIL BROTHERS.

A commercial firm having executed a power of attorney to their agent to draw bills of exchange upon them and never having given the public notice of the revocation of the agency cannot avoid the payment of bills drawn by the agent, on the ground of want of authority to draw the bill.

Where one of two parties must suffer, the loss must be borne by him who contributed to bring it about.

Evidence will not be admitted to establish a fact not alleged in the pleadings.

APPEAL from the Fourth District Court of New Orleans. *Theard, J.* *Elmore & King*, for plaintiffs and appellees, *McCay & Luzenburg*, for defendants and appellants.

LUDELING, C. J. This appeal is taken from a judgment against the defendants as drawers of a bill of exchange for £100 with interest and damages.

The only defense set up in the pleadings which is relied on in this court is that J. Briegleb, who drew the bill as agent of the defendants, had no authority to draw it.

Briegleb testifies as follows: "I was, at the time I drew the bill of exchange as the agent of Neil Brothers, authorized to do so. I was authorized to do so by a written power of attorney, of which a copy is annexed. *Neil Brothers* have recognized my authority to draw bills of exchange as *their agent*, on two previous occasions, by ordering J. C. Ollerenshaw, of Manchester, to accept and pay two drafts for £100 each, drawn by me previous to the one now in suit. They were paid. I drew under the authority of my power of attorney." -

The power of attorney referred to was dated fifth June, 1856, and was signed *Neil Brothers & Co.* The firm of Neil Brothers & Co. was dissolved in 1859. A circular announcing the dissolution of that firm also announced that the business would be continued under the *same name* at Mobile and New Orleans. Briegleb continued to act as their agent under the old power of attorney with their knowledge, and they paid his drafts drawn as agent. They thus induced the public to believe that Briegleb was their agent. If one of two parties must suffer the loss must be borne by him who contributed to bring about the state of things which caused the loss. Story on Agency, 856; 4 An. 19; 3 An. 400; 1 Parsons on Bills, 101. Besides the witness, Briegleb, positively swears that he was authorized by *Neil & Brothers* to draw the bill.

Our attention has been called to a bill of exceptions taken to the ruling of the court *a qua*, excluding certain testimony. The testimony of Briegleb, plaintiffs' witness, was taken by commission.

The defendants propounded a question to him, on cross-examination, to prove that the consideration was Confederate treasury notes or obligations. The question was objected to by the plaintiffs on the ground that this defense was not made in the pleadings, and they moved to strike out the answer of the witness to this question. The District Judge sustained the objection and rejected the answer. We think the ruling was correct. The proof must correspond with the allegations.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, and that the appellants pay the costs of the appeal.

No. 1441.—SUCCESSION OF MRS. L. WADE.

21	343
51	68

In a contest between the heirs of their deceased mother and the surviving husband for a partition of the separate estate of the deceased, a declaration made in the act of sale of real property to the deceased mother that the purchase was made by the wife with funds derived from the income and revenue of her separate paraphernal estate is, as between the heirs of the wife and her husband, who signed the act, conclusive against him. 16 An. 270.

Where an unmarried woman enters into an agreement in writing before a notary public for the purchase of real property, and makes a cash payment for a portion of the price, and executes her notes for the balance due at a future date, and she marries before the maturity of the notes, and the title is made in accordance with the agreement after the marriage takes place, the property thus acquired will, as between the husband and wife form a part of her separate paraphernal estate.

The husband of his deceased wife is not a competent witness to testify in any suit, against the interest of her succession, to any fact which took place during her life time. Acts of 1867, page 143.

A PPEAL from the Second District Court of New Orleans. *Thomas, J. Roselius & Philips*, for appellants, *J. B. Cotton*, for appellee.

HOWELL, J. One of the forced heirs of the deceased instituted this suit against her coheirs and the surviving husband for a partition of the property belonging to the succession, and the question to be determined on this appeal taken by the said husband is whether or not certain real estate standing in the name of the deceased is separate paraphernal or community property.

In the act of sale, dated January 26, 1856, of the large property at the corner of Jackson and Magazine streets, it is stated that the purchase was made by the wife with "funds derived from the income and revenue of her separate paraphernal estate," which declaration, as between the heirs of the wife and her husband, who signed the act, must be considered conclusive against him. 16 A. 271.

In the other acts of sale the purchases are made in the name of the wife without any such declaration, and as a community existed between the spouses, the property thus acquired fell into the community, unless it is clearly shown to have been bought with the separate funds of the wife, which she alone administered independently of her husband, or which never came under his administration. C. C. 2363, 2371, 2373, 2374, 2375; 17 L. 299.

The inquiry is, whether the evidence is sufficient to show that the funds used in making these purchases belonged to and were administered by the wife separately and alone.

The deceased was married to the appellant, H. F. Wade, in June, 1836, at which time she was keeping a profitable boarding house, and owned the furniture therein; four or five slaves, a tract of land in the parish of Terrebonne, and had by notarial act contracted for the property No. 55 Tchoupitoulas street, occupied as the boarding house, as follows:

On the sixteenth September, 1835, Thomas Banks, by act before a notary, acknowledging the receipt of \$7000 cash from Mrs. Terrill (the deceased) and her two notes for \$5500 each, due at twelve and eighteen months from said date, as the full consideration for the property, bound himself to make an absolute sale and transfer of the said property (No. 55 Tchoupitoulas street), as soon as the said two notes were paid, in the mean time giving her the control, rents, etc., of the premises. On the twenty-fourth March, 1837, about nine months after the marriage, the contemplated act of sale was executed, in which it is stated that, "for and in consideration of the sum of eighteen thousand dollars to him in hand, well and truly paid by Mrs. Lucretia Martin, of lawful age and wife of Henry F. Wade, also of this city, the receipt of which is hereby acknowledged," the vendor sells and transfers said property "to the said Mrs. Wade, herein duly assisted and authorized by her said husband."

In the case of *Lawson v. Ripley*, 17 L. 251, similar in some respects to the case at bar, it was held that an agreement entered into between a deceased husband and his vendor prior to marriage, for the purchase of a plantation, on terms specified in the act signed by both parties, was a complete sale before the marriage, and the land was declared to

Succession of Mrs. L. Wade.

be the separate property of the husband, with the announcement that if any portion of the price was paid with the funds of the community after the marriage it would be a charge against the husband in favor of the community.

In this case, the act of sixteenth September, 1835 (before the marriage), was something more than a mere promise to sell at a future date. It was in the form required for the sale of immovable property; it declared that the full consideration for the property was given, to wit: \$7000 paid in cash and two notes of \$5500 each, due at twelve and eighteen months, furnished, the receipt of all which was acknowledged, and that the premises were subject to the control of the party paying; and the rents, etc., arising therefrom belonged to her. As between the parties the sale was complete. There was an agreement as to the thing and the price, and there was a virtual delivery. It is not shown that the notes or any part of them were paid with community funds, while the evidence satisfies us that Mrs. Wade had separate means with which she could have paid. What may have been the effect of the act as to the creditors of the contracting parties it is unnecessary to inquire.

We conclude therefore that the property described as No. 55 Tchoupitoulas street was not *acquired* during the community, but was at the date of marriage as to the surviving spouse the property of the deceased, and consequently does not come within the operation of the doctrine invoked by the counsel of the husband, if correct as stated, that "there can be no acquisition of paraphernal property by the wife by an onerous title unless it be stated in the contract itself that the purchase is made by the wife, acting for herself, with the authorization of her husband for the purpose of investing or reinvesting her paraphernal funds."

The other pieces of property in controversy are in a different situation. They were acquired after the marriage, and the evidence does not make it clear that the wife retained the exclusive administration of her paraphernal property or its revenues, or that she used her paraphernal funds in making the purchases.

Article 2362 says: "The paraphernal property which is not administered by the wife separately and alone is considered to be under the management of the husband." And article 2363 says: "When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil or the result of labor, belong to the conjugal partnership if there exists a community of gains."

In the most favorable view for the petitioner it can only be said that the whole property was administered by the husband and wife indifferently. The witnesses who speak to this point, not including Mr. Wade, do not make it certain that Mrs. Wade administered *separately*

and alone. But there is in the record a judicial admission on the part of Mrs. Wade as to what she considered to be her separate property in November, 1847, at which date some of the purchases in question had been made. She then instituted suit against her husband for a separation of property, and in her petition only claimed judgment for the No. 55 Tchoupitoulas street property, the furniture and four slaves, as her separate property, and for \$26,000, money brought in marriage, to be paid with preference out of *the property belonging to her husband*. The judgment rendered on this petition was never perfected by execution, and we refer to the proceeding only to show Mrs. Wade's opinion, at the time, of her paraphernal rights. Of the property, which we are now considering as bought in her name, only one piece was purchased since that date, to wit: the property purchased from F. A. Conant on twenty-seventh October, 1855, and there is no satisfactory proof that she was then administering any paraphernal property separately, or that she used her paraphernal funds in paying the price.

The result at which we arrive is, that the property designated as No. 55 Tchoupitoulas street, and acquired by the act of sixteenth September, 1835, before Jules Mossy, notary public, and act of twenty-fourth March, 1837, before William Christy, notary public, and the property at the corner of Magazine and Jackson streets, acquired by act of twenty-sixth January 1856, before William L. Poole, notary public, are the separate property of Mrs. Lucretia Wade, deceased wife of Henry F. Wade, and that all other immovable property described in the petition herein for a partition, whether standing in the name of Mrs. Lucretia Wade or her husband, Henry F. Wade, belongs to the community which existed between them.

The testimony of Wade, the husband, was properly excluded under the statute thirteenth March, 1867, p. 143, which was in force at the date of the trial below, and which provided that "no interested person shall testify in any suit *against the interest* of the succession of a decedent in relation to any fact which took place in the life time of such decedent."

It was certainly against the interest of the succession of Mrs. Wade that the property should be shown to be community and not paraphernal property, and he was called on to testify to facts which took place in her lifetime tending to show that the property belonged to the community.

No other questions have been urged before us, and we have only to amend the judgment, from which the husband appealed, in accordance with the foregoing views.

It is therefore ordered that the judgment appealed from be amended to read as follows:

It is decreed that the property designated as No. 55 Tchoupitoulas street, in New Orleans, or lot No. 12 on a plan of Bourgeral, deput

Succession of Mrs. L. Wade.

surveyor general, twenty-sixth March, 1832, and acquired by the deceased, Mrs. Lucretia Wade, by and described in the acts of sixteenth September, 1835, before Jules Mossy, notary public, and of twenty-fourth March, 1837, before William Christy, notary public, and the property at the corner of Magazine and Jackson streets, New Orleans, and acquired by said Mrs. Wade, deceased, by and described in the act of twenty-sixth January, 1856, before William L. Poole, notary public, be declared the separate paraphernal property of the said Mrs. Wade, deceased. That all the other property described in plaintiff's petition herein for partition, whether the titles thereof be in the name of the said Mrs. Lucretia Wade, deceased, or her husband, Henry F. Wade, be declared to be community property, belonging the one-half to said Henry F. Wade and the other half to the succession of the deceased; and that as thus amended the judgment be affirmed. The succession to pay costs of appeal.

Rehearing refused.

No. 1966.—STATE OF LOUISIANA v. FRANK BROWN.

The bill of indictment under the seventh section of the act of the Legislature, approved March 14, 1855, must charge the accused with two specific acts, the concurrence of which, in point of time, creates a capital offense.

Where the indictment under this statute fails to set out the two distinct offenses which constitute the crime against which it is aimed, but sufficiently describes the offense of burglary, and a verdict of guilty of a capital offense has been returned by the jury and sentence is pronounced thereon by the court, the case will be remanded for sentence in accordance with the formalities prescribed against the crime of burglary.

APPEAL from the First District Court, parish of Orleans. *Abell, J. S. Belden*, Attorney General, for the State. *J. J. E. Planchard*, for defendant and appellant.

Howe, J. The defendant was tried upon an indictment preferred under the seventh section of the act of March 14, 1855, in which the offense charged is set out in the following language :

"That one Frank Brown, late of the parish of Orleans, on the twentieth day of June, in the year of our Lord one thousand eight hundred and sixty-eight, with force and arms, in the parish of Orleans, aforesaid, and within the jurisdiction of the First District Court for the parish of Orleans, did, with a dangerous weapon, to wit, a knife, and with the intent to commit the crime of murder, and while in the perpetration of the crime of robbery, stab and thrust one Ellen Elliott, contrary to the form of the statute," etc., etc.

He was convicted and sentenced to death, and from the judgment this appeal has been taken.

The section of the statute under which these proceedings were had is as follows :

21	347
49	372
21	347
50	26

"If any person lying in wait, or in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall shoot, stab or thrust any person with a dangerous weapon, with the intent to commit the crime of murder, he shall on conviction thereof, be punished with death."

Applying this section to the indictment in this case it will be seen that the indictment ought to charge the defendant with two specific acts, the concurrence of which in point of time creates the offense at which the statute is aimed. Neither of the offenses is in itself capital, but when the stabbing with a dangerous weapon and with intent to murder is done in the perpetration of a robbery there results a compound crime punishable with death.

In such a case we are of opinion that the indictment to support a sentence of death should state all the material facts and circumstances of each of the two offenses, which in their combination compose the grave charge against which the prisoner is called upon to defend himself. In the indictment now before us the first of these offenses is fully described, but the second, the crime of robbery, is not described at all. Whom did the prisoner rob? Of what was this unknown person robbed? On these points, at least, the indictment is silent.

It is true that the indictment follows the language of the statute, but this is not in all cases sufficient. For example, the twenty-eighth section of the same act provides that "whoever shall commit the crime of robbery shall, on conviction, suffer imprisonment at hard labor not more than fourteen years;" yet an indictment charging an accused with committing on a certain day the crime of robbery, without other description, would clearly be bad. And we are of opinion that where the "perpetration of the crime of robbery" is a substantive element in the offense charged, as it is in this case, and, in combination with another act, creates a capital crime, it ought to be set forth with as much distinctness of statement as if the crime of robbery alone had been charged. Archbold, vol. 1, p. 286, and cases cited.

As already stated, the crime of stabbing with a dangerous weapon, and with intent to murder, is sufficiently described in the indictment, and we are of opinion that the effect of the verdict of guilty must be limited to that offense. In this view the prisoner should have been sentenced under the eighth section of the statute to imprisonment at hard labor in the State penitentiary "for not less than one nor more than twenty-one years." And we think the interests of justice require that the cause should be remanded for this purpose.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed, that the cause be remanded to the court *a qua* for sentence in accordance with the views hereinbefore expressed, and to be further proceeded with according to law.

F. Avet & Cambon v. John Albo.

No. 1516.—F. AVET & CAMBON v. JOHN ALBO.

The bonding of the property attached by the defendant is not an acknowledgment that the writ of attachment providently issued.

The defendant in an attachment suit may have the attachment dissolved by a judgment of the court after he has come into the possession of the property attached, by giving bond for its release.

A PPEAL from the Fifth District Court of New Orleans. *Leaumont, J.*
A. L. Tissot, for plaintiffs and appellants. *E. Abell*, for defendant and appellee.

Howe, J. The plaintiffs have appealed from an interlocutory judgment setting aside and dismissing an attachment which they had obtained against the property of the defendant.

The only ground urged before us for a reversal of the judgment is, that before it was rendered the defendant had moved to bond the property attached, and on the same day the judgment was signed gave bond and took the property, and that therefore he acknowledged that the writ was providently issued and the judgment of dismissal was erroneous. We have not been referred to any authorities in support of this proposition.

The attachment was issued on the ground, substantially, that the defendant was about to leave the State permanently without there being a possibility in the ordinary course of judicial proceedings of obtaining or executing judgment against him previous to his departure, and that he was about to remove his property from the State before the debt to plaintiffs should fall due, without leaving within the limits of the State any property to meet said claim. It would seem that the attachment was set aside because these allegations were disproved. Under such circumstances if the defendant had actually bonded the property and then moved to dissolve, the rule would have been in time, and upon sufficient evidence would have been properly made absolute. *Pailkes v. Roux*, 14 La. 82; 1 An. 372; 2 An. 154; 13 A. 550; and *a fortiori*, it would seem that a mere motion to bond would not prevent the defendant from taking a rule to dismiss.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 1443.—CHARLES S. STEWART v. R. COHN et al.

A purchased a lot of furniture at auction sale, and afterwards induced the auctioneer to make the bill of sale to B. B then executed a notarial act of loan of the furniture to A. The furniture was seized by the creditor of A, and B enjoined. Held—that A was the owner of the property and the bill of sale from the auctioneer to B and the notarial act of loan from B to A were a mere sham, a simulation, to screen the property from the pursuit of the creditors of A.

A PPEAL from the Third District Court of New Orleans. *Fellowes, J.*
A. T. Steel and Whitaker & Rice, for plaintiff and appellee. *Myers & Augustine* for defendants and appellants.

Foster & McAllister, Erwin's Executors, v. Bank of New Orleans.

erate money was not received for Erwin & Son, nor authorized to be received by them, and that nothing appears to connect the Erwins with any transaction in Confederate money throughout the whole business, that the Bank on receipt of the checks informed the holders, through its cashier, that it was in receipt of their letters of sixteenth and twenty-third of December, 1861, "with twenty thousand dollars, which as requested, have been placed to the credit of James Erwin & Son."

It is shown that at the time these several checks were purchased, and afterwards when their proceeds were placed to the credit of the Erwins, Confederate money was bankable funds both in Nashville and New Orleans; that Conner & Son knew when they gave their check to pay those drawn upon them, that it would be paid in Confederate money. The testimony in the record renders it clear beyond a reasonable doubt that the so-called Confederate money was the exclusive, the only currency at that time in New Orleans. All business operations were carried on in that currency. Nobody expected to pay or be paid in any other money. The president of the Bank of New Orleans at that time testifies that from the time of the suspension of specie payments, sixteenth of September, 1861, the banks of New Orleans, including that of which he was president, received and paid out Confederate notes—all other notes, he adds, gradually disappeared from circulation; that on the first day of January, 1862, payments in the Bank of New Orleans were made in Confederate money. That it was then universally used in the payment of debts due to banks; that it was universally recognized in New Orleans as money; that it was bankable; that it was generally known and understood among the dealers of the Bank of New Orleans that checks on it would be paid in Confederate money; that notices were placed by the bank in the bank books of depositors that checks on it would be paid in Confederate money, and that that was the general understanding.

Another witness, a director of the same bank at the time referred to, corroborates the statement of the president in regard to the notices given to depositors, and says that the instructions to the officers of the bank were to give notice in all cases to depositors that the bank would pay checks on it in Confederate money, and that depositors would be required to receive the same currency deposited by them. He states that by the twenty-fifth of February, 1862, every bank in New Orleans had given the same notices. His testimony is to the same effect as that of the president as to the exclusive and universal circulation of Confederate money in New Orleans at that period.

Another witness, at the time in view, a note clerk of the Bank of New Orleans, and subsequently cashier of the bank, corroborates fully the testimony of the director. He says that the firm of James Erwin & Son never had any transaction with the Bank of New Orleans, except the solitary one out of which this suit has arisen. He shows that the funds placed by the bank to the credit of the Erwins were Confederate money, that the twenty thousand dollars deposited in

court (meaning the Confederate money to the credit of James Erwin & Son), he found in the Bank of New Orleans when he took charge of its funds.

Other witnesses confirm to a great extent the testimony we have detailed. All the witnesses concur in declaring the universality of the use at that time in New Orleans of Confederate money. They establish most conclusively that it was the only currency; that it entered into all commercial operations, that by it alone all banking business was carried on; all deposits made in all the banks were made in Confederate money. All money paid out by the banks was Confederate money; in short that every kind of trade, occupation and business carried on, used Confederate money as a medium of exchange. Finally that every species of negotiation whatever entering into the mercantile pursuits of the time and into the every day pursuits of life was performed through Confederate money as the sole medium of exchange, because the business purposes of the community could not otherwise have been accomplished.

It is in proof distinctly that at the time the Erwins bought the checks from the Nashville banks, Confederate money was bankable in Nashville, and it is also fully established that they gave for those checks either Confederate money or bank notes of Tennessee banks in good credit. It is a matter of history that at the period of these transactions specie payments were every where suspended throughout the so-called Confederate States. From the broad array of evidence spread out in the record we think the following deductions are legitimate and leave no reasonable doubt upon the mind and conscience of their truth. That the large sum forming the object of the adventure and the mode of the negotiation, imply that the Erwins were capitalists, conversant with money transactions, acquainted with the state of exchange and having a competent knowledge of the character and condition of the currency and of the banking operations going on at the time within the large range of their business.

That they paid for the checks they forwarded for collection to New Orleans either in Confederate money or in the notes of Tennessee banks, which nothing warrants us in believing were then in any better credit than Confederate money. Hence it results, that the probability is just as strong that they used Confederate money in the purchase of the checks as that they did not. That their implied knowledge of the course of trade and business at that day, negative the idea that they were ignorant of the kind of money the Bank of New Orleans was receiving and paying out at the time they forwarded their checks to that Bank, and this without any notice to that effect from the bank, although the evidence raises at least, a reasonable probability that they had such notice from the Bank. That under the existing state of facts, of which the inference is not admissible that they were ignorant, they tacitly and impliedly assented to receive in payment of their checks Confederate money, because Confederate money at that time

State of Louisiana on the relation of Edward Pinac v. W. S. Mount, Treasurer, and J. O. Landry, Controller, City of New Orleans.

No. 2221.—STATE OF LOUISIANA on the relation of EDWARD PINAC v. W. S. MOUNT, TREASURER, and J. O. LANDRY, CONTROLLER CITY OF NEW ORLEANS.

The Controller of the city of New Orleans may be compelled by a writ of mandamus to warrant on the City Treasurer for bills which he has approved. Mandamus is the proper remedy to compel a ministerial officer to perform purely ministerial acts. C. P. 834, 835, 844 ; 15 An. 834.

The Treasurer of the city of New Orleans cannot be compelled by a mandamus to pay a warrant not yet drawn by the Controller.

APPEAL from the Fifth District Court, parish of Orleans. *Léaumont, J. H. J. Leovy*, City Attorney, for appellants. *Hays & New*, for relator, appellee.

WYLY, J. This is a proceeding by mandamus to compel the Controller to issue warrants and the Treasurer to pay them, in discharge of certain registered claims against the city held by the relator, which have been duly authenticated and approved by the Controller.

The defendants denied generally the allegations of the relator, especially that he owns the registered bills, and aver that he has no right to proceed by mandamus, having a remedy by the ordinary mode.

The only evidence adduced was the registered bills made part of the petition.

From a judgment rendering the mandamus peremptory, the defendants have appealed.

The facts are not contested. The only question to determine is, has the relator the right to proceed by mandamus against these officers of the corporation of New Orleans? Have they refused to discharge a ministerial duty in declining to comply with the demand of the relator?

The duties of the Controller and Treasurer are defined in the thirtieth and thirty-first sections of the act amending an act "to consolidate the city of New Orleans, and to provide for the government and administration of its affairs," approved twentieth of March, 1856. (Acts 1856, p. 136.

By said sections it appears to be the duty of the Controller to audit all claims against the city, and the Treasurer to pay on the warrant of the Controller all claims authorized by the Council.

The defendants do not allege that the claims held by the relator are unjust, and not authorized by the Council.

The approval thereof by the Controller establishes their correctness.

Then was it the duty of these officers to issue the warrants and pay them as required by the relator? We think so.

These officers administer the finances of the corporation, receive its revenues and discharge its debts. The law has prescribed the mode of settling claims against the corporation, and has designated the duties to be performed by its officers. The Controller, J. O. Landry, in

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refusing to issue the warrants has evidently failed to perform his duty, and the relator has resorted to a remedy provided by law.

A mandamus is the proper remedy to compel a ministerial officer to perform purely ministerial acts. C. P. 831, 835, 844; 15 A. 331, and the authorities there cited.

This case cannot be distinguished from that of *Shaw v. Huvell*, and another, 18 A. 195, where a mandamus was made peremptory, compelling the Controller to issue and the Treasurer to pay a warrant to the sheriff on a voucher approved by the clerk and the Judge of the First District Court of New Orleans for certain fees and expenses incurred in criminal proceedings. The principle involved is identical.

But we do not consider that the mandamus should be made peremptory against W. S. Mount, Treasurer; he cannot be charged with failure of duty in refusing to pay the registered bills of the plaintiff. He could only pay them on the warrants of the Controller, which plaintiff did not have to present to him. A mandamus cannot be addressed to him to pay warrants to be issued. The writ will only lie to compel him to perform a duty which he has unlawfully failed to discharge.

It is therefore ordered that so much of the judgment as renders the mandamus peremptory against W. S. Mount, Treasurer, be avoided and annulled; that as to him the mandamus be set aside, and the petition dismissed; and that in every other respect the judgment appealed from be affirmed.

It is ordered that plaintiff pay costs of this appeal.

No. 1506.—JOHN D. CHAMPLIN and others v. W. G. BAKEWELL and ANN B. GORDON, Executors of ALEXANDER GORDON, deceased.

The act of the Legislature of 1853, page 190, and the subsequent acts of 1855 and 1865, making the Second District Court of New Orleans exclusively a probate court, and requiring all successions to be opened therein, does not divest the other District Courts of New Orleans of jurisdiction in succession cases pending in those courts at the date of the passage of the law. In such cases the jurisdiction of the court where the succession was opened is complete and exclusive until the final termination of all disputes involved in the settlement of the succession. 20 An. p. 466.

A judgment rendered by the Second District Court of the parish of Orleans, in a controversy wherein the Fifth District Court of the parish of Orleans has exclusive jurisdiction, is null and void, and the nullity will be so declared on appeal.

A PPEAL from the Second District Court of New Orleans. *Buchanan, J. C. T. Bemiss*, for plaintiffs and appellees. *C. M. Conrad & Son*, for defendants and appellants.

WYLY, J. This suit against the succession of Alexander Gordon was instituted in the Second District Court of New Orleans in May, 1866, to recover a certain draft and a sum of money paid on the agreement of W. G. Bakewell, the executor, to sell the plaintiffs the Mexican Gulf Railroad and the property belonging to said succession, which said

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agreement was never carried into effect by the legal transfer of the titles of said property.

The executors of Alexander Gordon excepted to the suit on the ground that the Second District Court was without jurisdiction *ratione materiae*, the succession having been opened in the Fifth District Court of New Orleans, which alone had jurisdiction of the case.

The exception was overruled, and the case decided in favor of the plaintiffs. The defendants have appealed. The question of jurisdiction must first be considered.

If the judgment was rendered by a court without jurisdiction it must be annulled.

The succession of Alexander Gordon was opened in the Fifth District Court of New Orleans in 1848. That court alone had jurisdiction at the time this suit was filed in the Second District Court, unless the jurisdiction of said succession had been transferred to the latter court by the acts of 1853, 1855 and 1865, creating it a strictly probate court for the parish of Orleans.

In the case of the State of Louisiana on the relation of W. G. Bakewell, executor, and Ann B. Gordon, executrix of Alexander Gordon, v. the Judge of the Second District Court, 20 A. 466, this question of jurisdiction was determined. The court decided that the several acts referred to, making the Second District Court strictly a probate court, did not divest the other district courts of the parish of Orleans of their jurisdiction over the successions already pending before them; and that the jurisdiction of the succession of Alexander Gordon and of this cause did not belong to the Second District Court, but to the Fifth District Court. The writ of prohibition was made perpetual, restraining the Judge of the Second District Court from proceeding further in the matter of said succession and in the suit now under consideration, which was then pending before the court on appeal.

Plaintiffs contend that since this appeal has been pending a law has been passed conferring the jurisdiction of this case on the Second District Court of the parish of Orleans, and therefore, under the circumstances, it would be a useless proceeding to avoid the judgment on the ground that the court which rendered it was then without jurisdiction.

It is quite immaterial what court is now invested with the jurisdiction of the case; the validity of the judgment must be determined by the jurisdiction of the court at the time it was rendered.

The Second District Court, as has been decided, had no jurisdiction at the time the case was tried, and the exception was improperly overruled. C. P. 164, 924, 986; 14 A. 333, 409.

It is therefore ordered that the judgment appealed from be avoided and annulled, and it is now ordered that this suit be dismissed without prejudice to plaintiffs' right to sue the succession of Alexander Gordon in the court now having legal jurisdiction thereof.

It is further ordered that plaintiffs pay costs in both courts.

No. 1018.—CORA A. SLOCOMB v. MANUEL J. DE LIZARDI.

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In order to justify a court of justice in rejecting a demand as contrary to the authority of the thing adjudged, it is necessary that the thing demanded is the same as in the first suit, is founded on the same cause of action, and the contest is between the same parties, acting in the same qualities. C. C. 2264, 2265; Marcade, vol. 5, p. 156.

To ascertain what is demanded in a particular suit resort must be had to the prayer of the petition. 16 La. 44; 1 Rob. 109.

The plea of *res judicata* to a second suit will not be maintained, unless it is shown to be between the same parties and acting in the same qualities with that of the first, founded on the same cause of action and on the same demand; if either of these requisites is wanting the plea will be overruled.

Notice to one member of a partnership which indorses a bill or note is notice to all, and if one of the firm dies before maturity, notice to the survivor will bind the estate of the deceased partner. Parsons on Notes and Bills, vol. 1, p. 602. Where a commercial partnership has been dissolved by the death of one of the partners, notice to the executor of the deceased partner will not bind the partnership on an indorsement of the firm name on a note made before the dissolution; in such a case notice should have been given to the surviving partner, especially if he be the liquidator or representative of the firm.

The certificate of the notary that notice was given by a letter directed to the indorser's bar-keeper, he not being in, is defective in not stating that the service was made at the endorser's residence or place of business. 1 An. 95; 2 An. 759.

The partner in *commendam*, by failing to have a final settlement of its affairs, does not *ipso facto* become responsible for the liabilities created by the active partner, after the expiration of the term of the partnership.

A partner in *commendam*, having allowed his money to remain in the partnership after the expiration of the term, as shown by the recorded act, under the belief that he was still a partner in *commendam* and only liable for the amount invested, cannot be held liable as a general partner, unless he has done something, or permitted something to be done, which the law declares will render him responsible as a general partner.

A PPEAL from the Fourth District Court of New Orleans. *Theard, J.* Bradford, Lea & Finney, for plaintiff and appellant. *R. Hunt, P. H. Morgan and G. Le Gardeur*, for defendant and appellee.

LUDELING, C. J. A judgment was rendered in this cause at the last term of this Court, by our predecessors, maintaining the defendant's plea of *res judicata*.

Having granted a new hearing, our first duty is to examine whether or not this exception is well founded.

The plaintiff seeks to recover from the defendant eight thousand dollars, with eight per cent. per annum interest on \$4000 thereof from the eleventh of April, and on \$4000 thereof from the eighteenth of April, 1861, being the amount of two promissory notes drawn and endorsed by Hugh M. Keary and endorsed subsequently by Juan Y. de Egana, upon the ground that these endorsements were made by the commercial firm of J. Y. de Egana, and that the defendant was, at the time they were made, a general partner in said firm.

The defendant denied all the allegations in plaintiff's petition, and especially that there ever existed between him and Egana any partnership, as alleged by the plaintiff. Subsequently he filed the exception of *res judicata*, and to support it, he pleaded the judgment of the Second District Court of New Orleans rendered on the eleventh January, 1864, in the matter of the succession of Juan Y. de Egana.

It is true, as stated by the counsel for defendant, that the authority of the thing adjudged is not a mere technicality of the law, but it is a

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principle of jurisprudence which is founded in the interest of society. It rests upon the broad and necessary doctrine that the disputes of men must, at some time, have an end, and it is, therefore, favored by the law.

But in order to justify courts of justice to reject a demand as contrary to the authority of a thing adjudged, *a legal verity*, it is necessary that *the thing demanded* should be the same as in the first suit, that *the demand* should be founded *on the same cause of action*, and that the contest should be between *the same parties, acting in the same qualities*. Thus, identity of the things demanded, identity of the causes of action, and identity of the parties and of their qualities are the conditions upon which alone the legal presumption is established in favor of the thing adjudged. C. C. arts. 2264, 2265; Marcadé, vol. 5, p. 156.

What, then, was *the thing demanded* in the suit in which the judgment of the eleventh of January, 1864, was rendered? As between Caballero, the executor, and Lizardi, the liquidator, it was to make the latter return to the former the property of the succession of Egana, in the event that the court should decide that it had been improperly delivered to him. On the eleventh of April, 1863, in consequence of proceedings by creditors of the succession of Egana against him, the executor filed a petition calling on the liquidator to file an account of his administration. The liquidator was ordered to file his account, which he did on the 30th of May, 1863. The executor opposed this account, prayed that it be rejected, and that, in the event that the court should decide that the executor had unlawfully turned over to the liquidator the money and property of the succession, that the liquidator should be ordered to return them to him. It is the prayer which indicates the thing demanded. 16 La. 44; 1 R. 109.

The prayers of the oppositions filed by the creditors do not show that Lizardi was sought to be made liable *as a general partner*.

But we deem it unnecessary to examine the oppositions of the creditors further, for *they* certainly did not represent any body but themselves. And if we admit that the executor did represent, in those proceedings, all the creditors, we have seen that *the thing demanded* in that suit was not to make Lizardi responsible for the debts of the firm of J. Y. de Egana, as a general partner.

The demand must be founded on the same cause of action.

What is the cause of an action? It is *the immediate foundation* of the right which one claims to exercise. It is *the immediate basis* of the demand—and hence we must guard against confounding *the cause* of action, either with the various circumstances which constitute the mediate bases, or simple means which produce this last cause, or with the *right itself*, which is *the object* of the demand.

The cause of action in this suit is the alleged endorsement of two promissory notes by Lizardi, as a member of the commercial firm of J. Y. de Egana.

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The cause of action between Caballero and Lizardi was the wrongful possession and unlawful administration of the property of the succession of Egana by Lizardi.

It is true that some of the creditors charged, in their oppositions, that Lizardi was a general partner, to show fraud and complicity between him and the executor; but this was not, nay, it is difficult to conceive how it could have been, the *immediate cause* of the action between the executor, creditors and liquidator.

Marcadé says: "Il ne faut pas confondre la cause avec les éléments qui viennent produire ou justifier cette cause. Sans doute, il y aura là des principes du droit demandé, et dès lors des bases de l'action par laquelle on réclame ce droit; mais ce sont des bases éloignées et médiate, des causes de la cause, que la loi n'aurait pas pu prendre ici en considération, sans éterniser les procès et depouiller de toute efficacité les décisions judiciaires. Il n'y a pas à se préoccuper de ces bases éloignées, et la cause ne se trouve que dans la base dernière, dans le principe immédiatement générateur que les Romains appelaient fort exactement *causam proximam actionis*." * * Vol. 5, p. 165. "La règle est donc de ne considérer ici que la base immédiate. Mais biens entendre, dès là que cette base immédiate n'est pas la même dans les deux demandes, il n'y a plus chose jugée, et la demande nouvelle est recevable." Mercadé, vol. 5, p. 166.

The demand must be between the same parties, and formed by them against each other in the same quality.

Lizardi was sued in the first suit in his fiduciary capacity as liquidator; in this cause, he is sued personally as a general partner of a commercial firm.

In the first case he was proceeded against by Caballero, executor of Egana; now he is proceeded against by a creditor of the firm.

But it is said that Caballero, executor, represented the creditors, and that the homologation of his account and tableau bars all further inquiries as to the matters included in the account. This is true, with some limitations. The effect of such a decree protects the executor or administrator in making the payments ordered or approved, and from liability for his gestion so far as that is approved; and it settles the claims of creditors against the succession as to the funds distributed, unless there be other creditors who were not placed upon the tableau. 4 An. 450; C. C. art. 1176.

Again, it is contended that the plea of *res judicata* must be held to be good, because the plaintiff acquiesced in the judgment by receiving a part of the fruits thereof. There is no doubt that acquiescence in a judgment however manifested, constitutes what is decided by that judgment the thing adjudged, that is, it becomes thereby a final judgment, from which there can be no appeal. C. C. art. 3522,

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But that is all. If a judgment which had become final by the lapse of time could not be pleaded as a bar to another action on account of the want of one or more of the conditions, which we have seen are necessary to give it the authority of the thing adjudged, it could not be set up as an estoppel if the judgment had become final by acquiescence.

It is immaterial how a judgment becomes *res judicata*; what is decided, by such a judgment, must be held to be *legally true between the parties to the suit*. And whether that judgment can be a bar to another action between the same parties, will depend on whether the thing demanded in the new suit be the same, and founded on the same cause of action, as in the suit decided. It is not necessary, therefore, to determine whether or not Mrs. Slocomb acquiesced in the judgment pleaded in bar of this action.

The "authority of the thing adjudged takes place *only with respect to what was the object of the judgment*." C. C. art. 2265.

The *object of the judgment* in the matter of the succession of Egana was to compel Lizardi to restore to the possession of the executor the property which Lizardi had received from him. "Il est bien entendu que c'est uniquement dans le dispositif d'un jugement, et non dans ses motifs, que se trouve la chose jugée. * * * Bien plus, le dispositif lui-même ne présente la chose jugée que pour les points qui sont vraiment décidés, et non pour ceux que ne s'y trouvent que comme de simples énonciations; *c'est en examinant les questions sur les quelles les parties étaient en désaccord et que leur débat présentait à décider, le quid judicandum*, que l'on arrivera facilement à comprendre ce qui a été jugé, le *quid judicatum*." 5 Marcadé, p. 155; Serey's Code Annoté, notes 58, 59 and 60, art. 1351 of the Code Napoleon.

In *Jeannin v. De Blanc*, 11 An. p. 466, this court said, "as this right is not put in controversy *by the pleadings*, so it is not barred by the judgment." 15 La. 485; 17 An. 104.

The exception should have been overruled.

ON THE MERITS.

Assuming that a commercial partnership existed, as alleged by the plaintiff, we think that the defendant cannot be held liable under the indorsements, for want of due notice of the dishonor of the notes.

The partnership, if it existed, would have been dissolved by the death of Egana in 1860. C. C. 2847, 2851; Story on Part. sec. 317, 319.

Manuel J. de Lizardi was appointed liquidator of the commercial firm, and he was put in possession of the property of the firm, which he proceeded to administer. Under these circumstances to whom was it necessary to give notice of the dishonor of the notes? We think

the notice should have been given to the liquidator, who was in this case the surviving partner. Story on Bills § 305.

Mr. Justice Story says, "Notice to one of several partners is notice to all the partners, and the notice may be given to any partner, either at his usual place of business or at his dwelling house, or at the usual place of business of the firm." "In cases of partnership, notice should be given to the firm; but notice to either of the partners will be notice to the firm. * * * If, in case of a note of a firm, one of the firm die, notice should be given to the surviving partner. Whether notice to the personal representative of the deceased would be valid does not appear to be settled by the authorities." Story on Promissory Notes § 310. In his work on Bills he says, "if one partner is dead, notice should be given to the survivor." § 339; 2 Hill, p. 635.

Mr. Parsons says, "Notice to one member of a partnership which indorses a note or bill is notice to all, *because each partner represents the interests of all the other partners AND of the partnership*, and the same has been held where notice has been given after dissolution and publication. So if one of the firm dies before maturity, notice to the surviving partner is sufficient to hold the estate and legal representatives of the deceased." Parsons' Notes and Bills, vol. 1, p. 502.

The reason assigned by Mr. Parsons for holding that notice to one of the partners is notice to all is because he represents the *other partners AND the firm*.

Who represented the partners and the firm after the appointment of Lizardi as liquidator? It would seem that the reason, upon which is based the rule which requires notice of non-payment to be given to the indorser, to wit: to enable him to take the necessary measures to obtain payment from the parties respectively liable, would require the notice to be given to the surviving partner, especially if he be the liquidator or representative of the firm. How could he know that the notes, of which the firm was indorser, had not been paid when due, if the holder gave him no notice of it? How was he to know, without notice, that the holder looked to the indorser for payment? The executor had no power to administer the partnership affairs nor did he represent the partnership—how then could a notice served upon him be regarded as a notice to the firm or to the surviving partner? 4 R. p. 276; 7 R. p. 13; 9 R. 124.

The only evidence in regard to the notices of protests is to be found in the certificates of the notary who protested the notes. The first certificate states that the notary served the notice in the following manner: "by directing the one for Hugh M. Keary, drawer and indorser, to him at Cheneyville, Louisiana, which letter I deposited prepaid in the post office in this city, on the same day of said protest, and by delivering the one for Juan Y. de Egana, in duplicates, one to J. M. Caballero, the testamentary executor of said Egana—the whole by my deputy, Lawson L. Davis—on the day below written, and by

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delivering the one for Cora A. Slocomb to her personally, by Lawson L. Davis, my deputy, on the day below written." The other certificate states that he notified the parties by directing the one for Hugh M. Keary in the manner stated above, and "by delivering the notices for Juan Y. de Egana, as follows, to wit: one to Mr. Dubreuil, *the partner of the agent* of the liquidator of said firm of Juan Y. de Egana, and another to the book keeper of Mr. Caballero, executor of said Egana, at his office, he not being in on the day below written."

The first certificate shows that an attempt was made to notify the surviving partner or liquidator. The second certificate shows that an attempt was made to serve a notice on the liquidator, but the service was improperly made. In 9 Rob. p. 75 this court held that a certificate that a notice was served "*by leaving it with the cashier of a bank, the indorser's elected domicile,*" is insufficient—*non constat* that the notice was not given to him at some other place, or that it was addressed to him there. So a certificate that "notice was given by a letter delivered to the indorser's bar keeper, he not being in" was held to be defective in not stating that the service was made at the indorser's residence, or place of business. 1 An. 95; 2 An. 759.

The certificate does not state *where* the notice was served on Mr. Dubreuil, the partner of the agent of the liquidator. "If notice be not given, it is a presumption of law that the indorsers are prejudiced by the omission." Story on Bills § 284. And they are discharged from all liability.

But as it is possible that the notary did give the notice to the liquidator, and that this fact might be established on another trial, it might be our duty to render a judgment of non-suit only. This, therefore, obliges us to examine another question raised by the pleadings.

The plaintiff alleges that, at the time when the notes sued on were indorsed by Juan Y. de Egana, there existed a general commercial partnership between Egana and Lazardi, carried on under the firm name of Juan Y. de Egana, and that Lizardi is responsible, *in solido*, with the succession of Egana for them.

In 1848 a commercial partnership was established in the city of New Orleans, in which Manuel J. de Lizardi was a partner *in commendam*. The business was carried on in the name of Juan Y. de Egana, and the partnership was to terminate in September, 1853. The act of partnership was duly recorded. The affairs of this partnership had not been settled at the period when Egana died. In 1860, Lazardi gave a power of attorney to his nephew to liquidate the affairs of the firm in case of the death of Egana, and after the decease of Egana, Lizardi, through his agent, filed a petition claiming to be appointed liquidator of the firm, as the surviving partner *in commendam*.

The counsel for the plaintiff infers from this that there existed a commercial partnership—that, as it is proved that no written act of partnership existed or was recorded, other than the one which expired

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in 1853, therefore Lizardi was a general partner and he is bound, *in solido*, under the indorsement.

We are not prepared to adopt these inferences. It is not correct to say that because Lizardi thought and said, in 1860, that he was a partner in *commendam*, when in truth he may not have been, therefore he was a general partner. His admission is that he was a partner in *commendam*. It would be illogical and unjust to construe this admission so as to make him a general partner, if he were not what he supposed he was. The admission cannot be divided. It either establishes the fact that he was a partner in *commendam*, or nothing. His opinion on the subject could not affect the facts, or the law governing the case.

The question is then presented for decision: Does the partner in *commendam* become responsible for the liabilities created by the active partner after the expiration of the term of the partnership in *commendam*, by failing to have a final settlement of its affairs, *ipso facto*?

We say this is the question presented, for there is no proof, nor is it alleged, that, prior to the death of Egana, Lizardi interfered with the business of the concern, or permitted his name to be used in it, or did any other thing, which under the provisions of the Civil Code would make him responsible as a general partner. We do not deem it necessary to decide whether a partnership in *commendam*, once duly recorded, may be extended or prorogued after the limitation thereof fixed in the recorded act, without complying with the forms set forth in article 2849 of the Civil Code. Whatever might be the consequences of such a state of facts, as between the partners, we cannot sanction the doctrine that one who has supposed that the partnership in *commendam* continued, in which he had placed his money, with the sanction of the law that he should not be responsible beyond that sum, should be held to be a general partner, and liable as such, without having done anything which could have induced creditors to believe that he was a general partner, or done or permitted any of the acts which the Code declares will render him responsible as a general partner. The Code says: "*In no case, except as in hereafter expressly provided, shall the partner who has no other interest in the concern than that of a partner in commendam be liable to pay any sum beyond that which he has agreed to furnish by his contract.*" C. C. art. 2813.

Here, then, is a textual provision of the Code supported by the well recognized principle that courts of justice cannot impose a penalty, which is not imposed by the law itself, which prohibits us from changing a partner in *commendam* into a general partner, except in the cases expressly stated. These cases are mentioned in articles 2816 and 2820, and they are the following: When the *original contract* has not been made in writing and recorded, or when the partner in *commendam*

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takes any part in the business of the partnership, or permits his name to be used in the firm, or knowingly allows any single person to whom he has made the advance, to add any words or name or firm that may imply that he has other partners besides the partner *in commendam*, when in fact he has none.

These views are supported by commentators on the Code Napoleon and by the French tribunals. Dalloz says (v. 40, v. Société, p. 682, No. 1420): "Les tribunaux n'ont pas admis cette prétention. Ainsi il y a été jugé que, lorsque deux personnes qui avaient contracté, pour un temps limité (trois ans, par exemple) une société en commendite, ont, à l'expiration de ce temps, continué pendant une année les affaires communes sur les bases précédemment établies, mais sans remplir les formalités légales de publication, cette continuation n'a pas changé, même à l'égard des tiers, la qualité des associés, et n'a pas établi de solidarité entre eux." (Paris, 17 Avril, 1839). Delangle, vol. 2 pp. 225, 226.

This position seems to be in consonance with law and equity. In conformity with the law, because it is nowhere declared by the law that a failure to record the prorogation of the partnership shall change the partner *in commendam* to a general partner; and in conformity with equity, because having always confined himself within the limits prescribed by law to a partner *in commendam*, third parties could have no pretext to claim that he was ever bound otherwise than in the manner shown by the recorded act of partnership *in commendam*.

We think the defendant is not liable under the indorsements on the notes made by Juan Y. de Egana.

It is therefore ordered, adjudged and decreed that the judgment of this court rendered on the twenty-third day of June, 1868, be annulled, that the judgment of the District Court be affirmed, and the appellant pay the costs of the appeal.

Mr. Justice Howell took no part in this decision.

NOTE.—This case was pending on appeal before the Supreme Court under the Constitution of 1864. On the twenty-third of June, 1868, a decision was had through Mr. Justice Ilsly, the organ of the court, sustaining the plea of *res judicata*, and affirming the judgment of the lower court. A rehearing was granted by that tribunal, and the case was transferred to the present court for examination on the rehearing. As the first opinion is overruled by this decision its publication in the reports is omitted.

Simon & Loeb v. Steamship Fung Shuey, Captain and Owners.

No. 1496.—SIMON & LOEB v. STEAMSHIP FUNG SHUEY, CAPTAIN AND OWNERS.

A common carrier is responsible to the shipper or consignee for the non-delivery of goods which has occurred through his fault or negligence.

The omission of the consignee to institute proceedings to recover goods which have been stolen from the ship before delivery, will not relieve the carrier from the damages resulting from the failure to deliver.

The estimate of damages for the loss of goods by the carrier is their net value at the port of destination.

A PPEAL from the Fourth District Court of New Orleans. *Théard, J. Phillips & Levy*, for plaintiffs and appellees. *Randolph, Singleton & Hardie*, for defendants and appellants.

LUDELING, C. J. Simon & Loeb sued the defendants for the value of a case of merchandise shipped at New York on the *Fung Shuey* and consigned to the plaintiffs at New Orleans, on account of the non-delivery of the merchandise.

The defendants filed a general denial. There was judgment in favor of the plaintiffs and the defendants have appealed.

The defendants rely upon the terms of the contract between them and the shippers, as shown by the bill of lading, to relieve them from responsibility in this case. The exceptions in the bill of lading are as follows :

“It is expressly understood that the articles named in this bill of lading, *shall be at the risk of the owner, shipper or consignee thereof, as soon as delivered from the tackles of the steamer, at her port of destination*, the collector of the port being hereby authorized to grant a general order for discharge immediately after the entry of the ship, and they shall be received by the consignee thereof, package by package, as so delivered ; and if not taken away the same day by him, they may (at the option of the steamer's agent), *be sent to store or permitted to lay where landed at the expense and risk of the aforesaid owner, shipper or consignee.*” R. 70.

The evidence proves that the consignee was at the wharf ready to receive the goods “as soon as delivered from the tackles of the steamer” from the moment she commenced to discharge her cargo until she finished unloading, and that the box in question was not delivered. Patrick Hays, agent of plaintiffs, testifies as follows : “I was at the steamer as soon as she commenced to discharge. I made the request for the goods as soon as she commenced to discharge. I was there from the time she commenced until she finished discharging. I received three out of the four cases. *The clerk told me* I was entitled to another case. I applied for it on the evening of the second March. I told the clerk I had received but three cases and wanted four. He told me to wait until the ship was discharged—it was not on the levee. I applied again on the third for the case. He searched for the goods

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with me, but could not find the case. He said the case might come out by the next steamer. When she came, after the *Fung Shuey* was discharged, *we could not find the case.*" Felix Veaux who discharged the ship, says that "Simon & Loeb had *four* cases, and he delivered *three*—that he does not know whether the missing box was on the levee or not." The testimony of all the witnesses tends to the same effect.

The case of goods was not delivered to the consignees through the fault of the common carriers. The exceptions in the bill of lading did not exempt them from liability for loss occasioned by a want of due care, or by gross negligence.

The fact that a part of the goods was afterwards found in the possession of an auctioneer, where they had been conveyed by a person who had stolen them, does not prove that the goods were delivered in accordance with the terms of the contract.

It is also contended that it was the duty of Simon & Loeb, the consignees, to have obtained possession of the remnant of the goods found at the auctioneers, and thus have lessened the damages which the common carriers had incurred. We think they did all that could have been required of them when they made affidavit for the arrest of the thief and notified the carriers that a part of the contents of the missing case was at Hoffman & Marks. If a carrier loses goods the net value thereof at the place of delivery is the measure of damages. Parsons on Contracts, vol. 3; 18 An. p. 1.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed and that the appellants pay the costs of this appeal.

No. 1616.—Succession of MRS. MARIE EPICHARIS DE ROFFIGNAC,
Widow of THEODORE DE GREHAN.

If the succession be accepted with benefit of inventory no part of it goes into the possession of the heirs as such until the estate shall have been administered, and until such administration the estate must remain under the authority of the Court of Probates where it was opened.

Real property situated in Louisiana, owned by a French subject residing in France, can not be administered in the courts of France; such property thus situated forms a separate succession from that in France, and must be administered according to the laws of Louisiana. Heirs residing in France must be recognized as such by the courts of Louisiana before they can be put in possession of property situated in this State, which they have inherited from their ancestor in France.

APPEAL from the Second District Court of New Orleans. *Thomas, J. Martin Blanche*, for appellant, *D. Augustine*, for appellee.

LUDELING, C. J. On the seventeenth of May, 1867, L. G. Luminais, administrator of L. F. Maxen, filed a petition in the Second District Court of New Orleans, alleging that the widow Marie E. de Gréhan died in France on the twentieth of December, 1864, leaving two children, one of age and the other a minor, her sole heirs, and that the succession consists of real property situated in the city of New Orleans.

Succession of Mrs. Marie Epicharis de Roffignac, Widow of Theodore de Grehan.

He alleges that he is a creditor of the succession. He further alleges that the minor heir had been emancipated in France, and he was represented by a curator *ad hoc*; that D. Augustin, Esq., of New Orleans, was the lawful attorney in fact of the curator *ad hoc* and of the heir of age, and he prayed that the heirs be cited, through their agent, to appear and declare if they accepted or renounced the succession of their mother; and he prays that the succession be administered according to law.

The defendants, through their agent and attorney, filed an exception to the jurisdiction of the court, on the ground that the succession *has been opened and finally settled by the judicial authority of Angouleme, France, and they, the heirs, have been put in possession of the property of the deceased, situated in France and Louisiana, that they have accepted the said property* and have been in possession of the property in New Orleans several years, and that the Probate Court is without jurisdiction.

The District Court maintained the exception to the jurisdiction of the court, and the plaintiff has appealed.

The judicial proceedings in France in the succession of the widow de Gréhan show that both heirs accepted the succession of their mother with the benefit of inventory. So that even if the proceedings in the French tribunals could affect the property in Louisiana the plaintiff was sustained by the textual provisions of the Civil Code and Code of Practice in his proceedings before the Second District Court of New Orleans. C. C. articles 1029, 1034, 1030, 1040, 1051; C. P. articles 979, 976, 977, 983 and 924.

If the heirs *are of age* and they accept the succession *unconditionally*, they must be put in possession of the property of the deceased, and they may be sued in *the ordinary courts* for their virile portion of the debts. If the succession be accepted with the benefit of inventory, no part of it goes into the possession of the heirs as such, until the estate shall have been administered. And until such administration the estate must remain under the authority and control of the Court of Probates where it was opened.

But it is an error to suppose that real property, situated in Louisiana, can be administered in the courts of France. The property of the deceased, situated in Louisiana, is a separate succession from that in France and must be administered according to the laws of Louisiana. 1 R. 263; 14 An. 633; 9 R. 438. Until this suit was instituted the heirship of the defendants had not been established and recognized in Louisiana; and the plaintiff was justified in the course he took to provoke the appointment of an administrator unless the heirs would accept unconditionally their mother's succession.

The exception should have been overruled. But the defendants in their exception as well as in a document subsequently filed in this case,

Succession of Mrs. Marie Epicharis de Roffignac, Widow of the late Theodore de Grehan.

declared that they had accepted the succession, and the evidence in this record establishes their heirship, and that they are now both of age.

“If the heir thus cited declares that he accepts, he shall be considered as having accepted the succession purely and unconditionally, and may be sued as if he had done so.” Article 980 C. P.

The object of the plaintiff's suit was thus attained.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed; that Arthur de Gréhan and George de Gréhan be recognized as the heirs at law of Mrs. M. E. de Gréhan, and that they pay the costs in both courts.

NO. 1489.—MAXEN & SHEARER v. WILLIAM LANDRUM, STONER & TURNER, Intervenors.

It is the amount in dispute in the District Court that gives the Supreme Court jurisdiction of the appeal.

The privilege of the consignee, who has made advances on the goods or property in his possession through his agent is superior to that of the attaching creditor. C. C. 3214.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Cazabat, J. Frank Haynes*, for plaintiffs and appellees, *Marr & Foute*, for defendant and intervenors, appellants.

HOWE, J. The plaintiffs, appellees, have moved to dismiss the appeal in this case on the allegation that the amount in dispute does not exceed five hundred dollars. The amount claimed by plaintiffs was the sum of \$868. A number of cattle were attached and bonded by the intervenors, whose claim thereon for advances was the sum of \$2045 93. The cattle were sold for \$2089 50. Although, therefore, the plaintiffs had judgment for the sum of \$350 only, this court has jurisdiction by reason of the amount in dispute in the court below.

Proceeding then to examine the case upon its merits, we are satisfied from the evidence that when on the twenty-ninth September, 1866, the plaintiffs levied their attachment on the cattle, the proceeds of which are in dispute, the cattle were already in possession of the intervenors. It appears that on or about the twenty-seventh September, 1866, the agent of the intervenors advanced to Landrum, at Sabine Pass, some five hundred dollars upon the cattle, which were then at that place, and himself shipped them to the intervenors. The other advances were made prior to the attachment, except the freight money, which was paid by intervenors with subrogation to the rights of the carrier. It can not be doubted that under such circumstances the privilege of the consignees, who were in possession through their agents, was superior to that of the attaching creditors. C. C. 3214, and amendments.

Maxon & Shearer v. William Landrum, Stoner & Turner, Intervenor.

In this view the judgment of the District Court is erroneous, so far as it accords to the plaintiffs a privilege on the property attached superior to that of intervenors.

The defendant has not appealed, and the judgment rendered against him personally, upon his appearance and answers, in favor of the plaintiffs, and also of the intervenors, must remain undisturbed.

It is therefore ordered and adjudged that the judgment appealed from, so far as it decrees to plaintiffs priority of privilege on the property attached, and to the intervenors a privilege only on the remainder of the proceeds, be avoided and reversed. It is further ordered that the intervenors, Stoner & Turner, be paid the amount of their judgment against defendant, by preference and priority, out of the proceeds of the property attached; that the plaintiffs' privilege be recognized upon the remainder of such proceeds, if any; that in all other respects the judgment be affirmed, and that the appellees pay the costs of the appeal.

No. 1794.—SUCCESSION OF JAMES FORSYTH, Opposition to Executor's Tableau.

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The declaration of the testator in his last will and testament are presumed to have been made with deliberation and reflection, and are entitled to due consideration, but they can not be permitted to outweigh his express acknowledgment in an authentic act.

A PPEAL from the Second District Court of New Orleans. *Thomas, J. W. O. Denégre*, for appellant, *C. Belcher*, for appellee.

TALIAFERRO, J. This is a contest between two of the heirs of the deceased in relation to their distributive shares of the estate of their ancestor. James Forsyth died in March, 1866, leaving three heirs, Adelia Forsyth, widow of A. P. Simpson, Joseph Forsyth and Fanny Jones, a grand daughter, representing her deceased mother, Elizabeth Forsyth. The decedent left an olographic will, which was admitted to probate soon after his decease, and Mills Judson, named as executor, was duly qualified. The executor presented his final account and tableaux on the first of April, 1867, and by his plan of distribution, according to his conception of the purport of the will, he required Mrs. Simpson to collate the sum of \$2100, \$1600 of which being the value of certain property donated to her under an onerous title, and \$500, a donation in money. The tableau was opposed by Mrs. Simpson, and her opposition was sustained, and an order was rendered for its amendment. From this judgment Fanny Jones, by her tutor, appealed.

On the twenty-ninth of July, 1840, the testator passed an act before a notary of the city of New Orleans wherein he declared "that for the consideration of fifteen hundred dollars, to him paid in ready money, the receipt whereof is hereby acknowledged and acquittance granted

therefor, he does by these presents grant, bargain, sell, etc., unto Mrs. Adelia Forsyth, wife of Andrew Pickens Simpson, of this city, a lot of ground, situated at the corner of Dryades and Clio streets."

In his will the testator enumerates the advances he had made to his children. To Joseph Forsyth he had given \$8500, a sum equal to or beyond his distributive share, and stated that this heir could expect nothing from his estate; to W. A. Jones he had given a negro woman of the value of \$700; to Mrs. Simpson he had given a lot of ground, at the corner of Dryades and Clio streets, of the value of \$1600; also, that he had given her a check on New York, just before she was married, to be sent to A. P. Simpson, her intended; to buy furniture, and that he gave her in September, 1857, \$1000, for which she gave her note with eight per cent. interest, the amount, at the end of seven years and a half, being \$3700.

Mrs. Simpson filed her opposition to the tableau, and specially opposed that item by which she was required to collate the sum of \$2100, and alleged that she had never received anything from her father in advance of her share by checks, money or lot of ground. She averred that the lot of ground was purchased from her father by Simpson, her husband, and paid for by him.

The note was placed upon the inventory and specified in these words: "One note of Mrs. A. P. Simpson, dated the nineteenth of September, 1857, renewable one, two and three years for \$1000, with eight per cent. interest." The opponent filed in this court the plea of prescription of five and ten years and all other prescription applicable against any indebtedness to the succession.

The question before us is one of evidence. The opponent claims title to the lot of ground by the act of sale. This sale is not attacked under the provisions of article 2419 of the Civil Code, which provides that "the sales of immovable property or slaves made by parents to their children may be attacked by the forced heirs, as containing a donation in disguise, if the latter can prove that no price has been paid or that the price was below one-fourth of the real value of the immovable property or slaves sold at the time of the sale." This article is not invoked to show the sale to have been a simulation or donation in disguise, but the appellant claims the collation of the lot of ground for the reason, as she avers, that there was no price paid for it by the opponent, and relies chiefly upon the declarations of the testator himself, made in his act of last will, to establish the sale to have been a mere donation. The opponent contends that these declarations are not evidence against her, that they are to her prejudice as a forced heir, and were intended to reduce her *legitime* in the estate of the father. We are willing to concede that the declarations of the testator, made, as doubtless they were, with grave deliberation, are entitled to due consideration, but we are not prepared to go to the extent of permitting them to outweigh

his express acknowledgment in an authentic act that he had sold the property and received the price. The articles 1324 and 1326 of the Civil Code, as well as article 2419, already adverted to, seem to indicate the course to be pursued to set aside pretended acts of sale as being donations in disguise. The appellant should have resorted to the proof which these articles seem clearly to require in such cases. The sum of five hundred dollars given to Mrs. Simpson immediately preceding her marriage, to buy furniture, must be regarded as a marriage present, which, as it does not exceed the disposable portion, is not subject to collation. The opponent's plea of prescription it is not necessary to examine.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 1962.—STATE OF LOUISIANA ex. rel. GEORGE W. AVERY v. WILLIAM S. MOUNT, City Treasurer.

A mandamus is the proper remedy to compel the Treasurer of the city of New Orleans to pay a warrant drawn upon him by the Controller, and the writ will properly be made peremptory when the Treasurer in his answer discloses no sufficient reason for his refusal to pay. The writ of mandamus will not lie to compel the Treasurer of the city of New Orleans to perform any act where it becomes his duty as the fiscal agent of the city to exercise a discretion.

In a proceeding by mandamus to compel the Treasurer of the city of New Orleans to exchange certain bonds of the city for warrants drawn by the Controller, the court will not, under the prayer for general relief, render judgment ordering the Treasurer to pay the warrants in money.

A PPEAL from the Fifth District Court for the parish of Orleans. Léaumont. J. J. H. New, for plaintiff and appellee, H. J. Levy, City Attorney, for defendant and appellant.

Howe, J. The relator in his original petition represented that he was the owner and holder of certain described warrants drawn by the controller of the city of New Orleans on the treasurer thereof, amounting in all to the sum of \$37,286 92, which had been issued to him in his capacity of Sheriff of the parish of Orleans; that payment thereof had been amicably demanded of William S. Mount, the treasurer of the city of New Orleans, and refused: "that by virtue of an act of the Legislature of Louisiana, approved September, 1863, the city of New Orleans has issued certain bonds bearing ten per cent. interest to mature at not more than five years, and though said bonds are now at a heavy discount in the market, petitioner is willing to receive them in satisfaction of his warrants, claiming however the bonds of the longest period as approximating nearer to the sum justly due him;" and, after various formal allegations the relator prayed that a writ of mandamus issue directing the Treasurer to deliver to relator the bonds aforesaid having the longest period to run before maturity to the amount of his claim.

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By a supplemental petition the relator further claimed interest on his warrants from their respective dates.

The defendant excepted on the ground that the claim of the relator was one for debt, and further that the relator was not entitled to the remedy in this case of mandamus. He further pleaded a general denial.

Upon the trial the relator testified that the allegations of his petition were true, that he was the owner of the warrants in question and that he had demanded payment of the defendant which was refused. This testimony, with the warrants themselves, constitutes the entire evidence in the case.

The court *a qua* gave judgment that the writ of mandamus be made peremptory and that the defendant deliver to relator a sufficient number of the bonds above described to cover the amount of the warrants, "said bonds to be of those having the longest period to run before maturity." It was further ordered "that the defendant pay the costs of suit, and legal interests on the aforesaid warrants from their respective dates."

From this judgment the defendant has appealed.

We consider it well settled that mandamus is the proper remedy to compel the treasurer of the city of New Orleans to pay a warrant drawn upon him by the controller, when he has no legal discretion to refuse payment, and that a mandamus will properly be made peremptory when the treasurer in his answer discloses no sufficient reason for his refusal to pay. 18 An. 195; State ex. rel. Pinac v. Landry, 21 An. p. 252.

But the facts of this case are peculiar. The relator does not ask the defendant to do a duty imposed upon him by law, and which the defendant has no discretion to decline. He asks that the treasurer be required to deliver to him certain bonds bearing the unusually high rate of interest of ten per cent. per annum; he asks for bonds having the longest period to run, and on which, if delivered to him the city would be obliged to pay ten per cent. per annum interest till maturity; and he further asks that the defendant be compelled to pay him interests on his warrants for considerable periods.

We are of opinion that the defendant had a legal discretion to refuse all these demands. As far as the bonds are concerned, if there are such bonds under his control, the law of September 5, 1868, under which they are alleged to have been issued, simply authorizes the city of New Orleans to borrow one million dollars at a rate not exceeding ten per cent. for the purpose of meeting current expenses and paying "the employes" of the city. We can perceive nothing in this law which makes it the duty of defendant to deliver to the relator ten per cent. bonds of the city for his warrants. The fact that the relator is willing to accept these bonds does not impose on the defendant the duty of delivering them. Much less does this statute require the

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treasurer to deliver to relator, of those bonds, such as have the longest time to run; on the contrary, a just regard for the financial interests of the city might well dictate to the treasurer the policy of withholding from use as many of such extravagant obligations as he possibly can. And lastly we are not furnished with any authority for the order that the treasurer pay interest on the warrants, and we think that such interest, if exigible, should be made the subject of an ordinary action.

There is a prayer for general relief by relator, but we find ourselves unable, under this, to render a judgment in his favor directing the payment of the warrants in lawful money, for it may be that if this specific relief had been demanded under proper allegations, the defendant might have shown some legal reason for a refusal of payment.

For the reasons given it is ordered and adjudged, that the judgment appealed from be avoided and reversed, and that the petition of the relator be dismissed, without prejudice, with costs in both courts.

No. 1603.—SUCCESSION OF JESSE W. WILDER.

The surviving partner of a commercial firm, in his capacity of liquidating partner, having received Confederate treasury notes in payment of the debts due the firm, became personally responsible to the heirs of the deceased partner for the amount shown to be due them on a settlement of the partnership.

A PPEAL from the Second District Court, of New Orleans. *Thomas, J. Frank Haynes, Race, Foster & E. T. Merrick and Buchanan & Gilmore*, for opponents and appellants. *T. A. Bartlette*, for appellee.

WYLY, J. In January, 1862, Jesse W. Wilder died, and his surviving partner, Henry C. Petty, was appointed by the court liquidator of the partnership business.

In 1866 he filed his account showing that during the years 1862 and 1863 he had collected a large amount in settlement of the claims of the firm, and showing a large balance due the succession, which he asked to be relieved from paying over because he had collected the same in Confederate treasury notes.

Harriet A. Jourden, the widow of the deceased, as natural tutrix of her minor children, and George Wilder, the son of the deceased by a former marriage, opposed the homologation of the account and prayed that the liquidator be compelled to pay over to the succession in legal currency of the United States the full amount due.

The liquidator was required by the court to file an amended account, which he did, showing a balance in his hands of \$12,939 46 in Confederate notes, which he had collected in payment of the claims of the partnership—one half of which he alleged, belonged to the succession.

The tutrix again opposed the account alleging that the succession cannot be charged with the loss of the Confederate notes; that they were not a legal tender and should not have been received by the

liquidator; that if he received them, as alleged, he did so at his peril. That she was during the time tutrix of her children, and the liquidator made no settlement with her but detained the Confederate notes in his hands till they had become worthless.

From a judgment dismissing the opposition and approving and homologating the account, the tutrix and George Wilder have appealed.

The main question involved in this case is, did the liquidating partner become liable to the estate by collecting its assets in Confederate notes? Can the succession be charged with the loss of the Confederate notes received by the liquidator in settlement of the claims in his hands for collection?

The liquidator contends that at the time he received the Confederate notes they were used as the only currency; that if he had not received them in payment of the claims they would have been barred by prescription; and that, inasmuch as the Confederate notes had no value, he received nothing; having received nothing, he is liable for nothing.

We do not so understand the law regarding the liability of a liquidator. His powers over the assets confided to him by the court are not unlimited. Like all fiduciaries he is bound to faithfully perform his duties. He cannot waste the estate by voluntarily remitting the debts that are due to it. He cannot give up its assets and receive nothing in return. He cannot receive in settlement of the credits in his hands for collection the notes of an illegal organization and charge the succession with the loss incurred thereby. It was his duty to collect the claims due the succession in lawful money; he had no authority to receive therefor Confederate notes.

The succession in our opinion should not be charged with the loss occasioned by the illegal act of the liquidator.

It is therefore ordered that the judgment appealed from be avoided and annulled, and it is now ordered that the opposition herein be maintained so as to place Harriet A. Jourden in her capacity of tutrix of her minor children and George Wilder, one of the heirs of the deceased, as creditors on the account rendered by the liquidator, Henry C. Petty, and filed on twenty-third April, 1867, in the sum of six thousand four hundred and sixty-nine dollars and seventy-three cents, subject to a credit of three hundred and fifty-five dollars and forty-three cents; and, thus amended, that the account be approved and homologated. It is further ordered that H. C. Petty pay the costs of this opposition in both courts.

Rehearing refused.

John V. Sevier v. The Succession of James G. Gordon.

No. 2046.—JOHN V. SEVIER v. The Succession of JAMES G. GORDON.

The acknowledgment, written on the back of a promissory note by the administrator or executor, amounts to an interruption of prescription, which begins to run again from that date. The administrator or executor is without the power to renounce or waive prescription after it has been acquired in favor of the estate he represents.

APPEAL from the Thirteenth Judicial District Court, parish of Tennessee. *Farrar, J. Farrar & Reeves* and *A. N. & H. N. Ogden*, for plaintiff and appellant. *Julius Aroni* and *Thomas P. Clinton*, for defendant and appellee.

HOWE, J. A rehearing was granted in this case upon the motion to dismiss; and, it appearing by the record that the plaintiff's attorneys accepted service of the petition of appeal on the twenty-third April, 1863, a fact which escaped our attention in our first examination, the motion to dismiss must be overruled and the cause decided on its merits.

The appeal is taken from a judgment by which these promissory notes, made by James G. Gordon and held by plaintiff, were ranked as acknowledged debts of the succession, and ordered to be paid in the due course of administration.

The plea of prescription of five years is filed in this court by George W. Sargent, dative testamentary executor, the appellant.

The notes matured as follows, respectively: June 24, 1854, December 15, 1854, and January 4, 1855. In the early part of the year 1855 they were presented to John Routh, then executor of Gordon, deceased, and were indorsed by him as follows:

"I resented and allowed, and will be paid on the settlement of the estate.

"JOHN ROUTH,

"Executor estate of J. G. Gordon."

On the thirtieth October, 1863, the following indorsement was made on each of the notes:

"I hereby waive prescription on the within notes. Lake St. Joseph, October 30, 1863.

"JOHN ROUTH,

"Executor estate of J. G. Gordon."

On the twenty-sixth June, 1867, the plaintiff filed his petition in this case, with the notes and their indorsements, and on the same day the judgment was rendered, from which the present executor, Sargent, has appealed.

We think it clear that on the thirtieth October, 1866, prescription had been acquired upon the notes. We are unable to perceive how the acknowledgment by the former executor in 1855 could have greater effect than a similar act by the maker in his lifetime; and it is unnecessary to consider what would have been the legal result if this acknowledgment had been followed by an application at that time to the judge to have the claims ranked among the acknowledged debts of

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the succession, and the taking of such succeeding steps as are provided by law. C. P. 985, *et seq.*

The acknowledgments in 1855 amounted to an interruption, and nothing more; and prescription began to run from that date. Succession of Dubreuil, 12 Rob. 507, 511.

It is urged by plaintiff that the dative executor has no right, under the circumstances of this case, to plead prescription; but we do not find, either in precedent or reason, any authority for this proposition. As dative executor it is his duty to defend the succession against the enforcement of claims that have been prescribed, and which are therefore presumed to have been paid. Having this right, the only question remaining in the case is whether the waiver by the former executor, on the thirtieth October, 1866, was, as to the succession, a valid renunciation of an acquired prescription.

In Lafon's heirs v. his executors, 3 N. S. 716, it was held that executors cannot, even by a *payment*, if unauthorized by the court, deprive creditors, legatees and heirs of the protection of an acquired prescription.

In Whittakam v. Swain, 9 Ann. 123, it was held that, inasmuch as the power to renounce prescription could only exist in one having a capacity to alienate, a tutor could not renounce a prescription *liberandi causa* acquired by his ward. Following the principles thus settled, and applying them as they would seem to be properly applicable to the facts in the case at bar, we must conclude that the executor, Routh, had no power in 1866 to renounce the prescription which had been acquired on these debts; and thus deprive the succession of a vested right.

Upon the face of the record the notes are prescribed, and the judgment appealed from must be reversed.

The appellee having asked that the cause should be remanded in case this conclusion should be reached, it is ordered and adjudged that the judgment of this court heretofore rendered dismissing the appeal be annulled. It is further ordered that the judgment appealed from be avoided and reversed, and the cause remanded to be proceeded with according to law, and that the appellee pay the costs of the appeal.

No. 2143.—D. R. CARROLL & Co. v. B. D. DOUGHTY, Tutor.

The holder of an obligation signed by the tutor cannot recover against the minor, unless he shows authority in the tutor to make it.

An obligation signed by the tutor for supplies to carry on the plantation of his ward will not bind the minor, unless it is shown that he is authorized to carry it on for and on account of the minor, or that the advances made inured to his benefit.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. Posey, J. McVea & Hunter, for plaintiffs and appellees. Cross & Hardee and Race, Foster & E. T. Merrick, for defendant and appellant.

TALIAFERRO, J. The defendant is sued in his capacity of tutor on the following obligation :

D. R. Carroll & Co. v. B. D. Doughty, Tutor.

“\$800.

“CLINTON, LA., June 29, 1867.

“On or before the first day of December next, I promise to pay to D. R. Carroll & Co. or order, six hundred dollars, drawing eight per cent. interest from date till paid, for value received, with two and one-half per cent. commission for advancing, being cash advances for the purpose of supplies to make a crop the present year. I hereby obligate myself to ship to D. R. Carroll & Co. my entire crop of cotton I may make this year; in default thereof to pay said D. R. Carroll & Co. two and one-half per cent. commission on the amount of any of my cottons otherwise disposed of.

“B. D. DOUGHTY, Tutor.”

Judgment was rendered in favor of plaintiff after default taken, there being no defense made. The defendant appealed.

We see no evidence whatever to authorize the plaintiff to recover upon the obligation sued on.

It is not shown that the plantation furnished belongs to the minors, nor if it does, that the tutor was authorized to carry it on for and on account of the minors; nor that the supplies advanced inured in any manner to their benefit. No authority is shown in the tutor to execute the obligation, and without it he could not bind the minors. Civil Code articles 340, 348; 4 An. 258 and 543; 11 An. 667.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered that judgment be rendered in the defendant's favor, the plaintiff and appellee paying costs in both courts.

No. 1429.—J. RANDALL TERRY v. J. Q. A. FELLOWS and others.

An action of slander will not lie for anything said by a witness in answer to questions propounded by either party in a judicial investigation.

A newspaper is not liable in damages for libel in publishing the testimony of witnesses given before an investigating committee of the Congress of the United States. In giving publicity to such evidence through the newspapers the privilege of the press is not abused.

A PPEAL from Fifth District Court of New Orleans. *Leaumont, J.* *B. R. Forman*, for plaintiff and appellant, *Alexander Walker, W. B. Mills* and *L. M. Day*, for defendants and appellees.

WYLY, J. Plaintiff appeals from a judgment dismissing his suit on the peremptory exception that his petition discloses no cause of action. He claims \$50,000 for damages sustained by him on account of a slander and libel uttered and published by the defendants.

The petition alleges that the defendant, Fellows, in giving evidence before a committee of Congress, which was appointed to investigate the causes of the unhappy disturbance in this city on the thirtieth July, 1868, did falsely and maliciously declare that plaintiff, “J. Randall Terry, took part in the late rebellion against the United States,

21	375
47	252
47	831

21	375
116	420

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and in March, 1862, when General Lovell was reviewing the rebel forces in this city to show their strength, he did carry the black flag whereon was a skull and cross-bones, which meant no quarter to the enemy in the fight."

Plaintiff avers that the defendants, W. H. C. King & Co., owners and proprietors of the New Orleans *Times*, did knowingly and maliciously publish the false statements of said witness.

He alleges that said declarations are false and slanderous, have damaged his reputation for loyalty, injured him in public esteem, laid him liable to prosecution for treason and perjury (he having taken the oath kown as the test oath), and have deprived him of a lucrative office under the United States, which otherwise he would have obtained.

The statements, alleged to be slanderous, were made by the witness, Fellows, in answer to the interrogatories propounded to him by the committee of Congress.

The peremptory exception upon which the case was tried raises the question, whether a witness can be held liable in a civil action for declarations made by him in delivering his testimony.

Plaintiff contends that he can be made liable for the injury occasioned by his false statements under the broad doctrine laid down in article 2294 of the Civil Code which declares that, "Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it."

The defendants on the other hand, contend that this comprehensive rule of law does not embrace a case like this, that public policy necessarily excepts witnesses and others in discharge of public duty, from the application of this rule.

The words complained of were uttered by the defendant, Fellows, in response to interrogatories propounded to him as a witness.

He claims immunity from damages, not on account of the subject matter of his testimony, but from the occasion and the capacity in which he delivered it.

As a witness, he was compelled to answer the questions propounded to him by the committee, and, in our opinion, he should not be held responsible in an action for damages.

The administration of justice requires the testimony of witnesses to be unrestrained by liability to vexatious litigation. The words they utter are protected by the occasion, and can not be the foundation of an action for slander.

"Witnesses, like jurors, appear in court in obedience to the authority of the law, and therefore may be considered as well as jurors to be acting in the discharge of a public duty, and though convenience requires that they should be liable to a prosecution for perjury committed in the course of their evidence, or for conspiracy in case of a combination of two or more to give false evidence, they are not respon-

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sible in a civil action for any reflections thrown out in delivering their testimony." Starkie on Slander, page 242.

The same author, after discussing numerous authorities, arrives at the conclusion that an action of slander does not lie for anything said or published in the course of a judicial proceeding. Starkie on Slander, 254.

For the reasons assigned we are of opinion that the petition discloses no cause of action against the defendant, J. Q. A. Fellows.

We are also of the opinion that the publication of his testimony by the defendants, W. H. C. King & Co., proprietors of the New Orleans Times, gave the plaintiff no legal cause of action against them. The privilege of the press has not been abused. They have simply published without comment the evidence taken by an investigating committee of Congress, which we deem to be in every respect lawful.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 1444.—ALANSON MARSH v. JEDEDIAH WATERMAN.

Evidence is not admissible to establish a special defense under the general issue.

A simple waiver of protest does not, as a general rule, dispense with demand and notice; but where a draft is made payable at a particular date, indorsed in blank by a commercial firm, and one of the firm writes on the back of it on the day of maturity, and only three or four hours before the usual time for protesting, "protest waived," he will be bound on the draft without further notice of its dishonor. *Carmena v. Mix*, 15 La. 163.

A PPEAL from the Fourth District Court of New Orleans. *Théard, J. Randolph, Singleton & Brown*, for plaintiff and appellee. *Semmes & Mott*, for defendant and appellant.

TALIAFERRO, J. The defendant, sued as indorser of a bill of exchange drawn upon F. B. Ernest by D. S. Rea, filed the plea of *lis pendens*, which being overruled he answered by a general denial. The plaintiff avers that the defendant waived protest of the bill by a written instrument, which is in these words:

"NEW ORLEANS, February 19, 1862.

"We waive protest on defendants—on D. S. Rea, on T. B. Ernest.

(Signed)

"J. WATERMAN & BROTHER,

In liquidation."

On the trial of the case the defendant was introduced to prove by his own testimony that he was induced to sign the waiver by the declaration of plaintiff that he would, before three o'clock of that day, procure a similar waiver from the other parties to the bill, or failing in that, cause the bill to be regularly protested. To the admission of this testimony the plaintiff objected on the following grounds:

First—That it was an attempt to vary, alter and contradict a written agreement by parol.

Second—That it was a special defense, evidence in regard to which could not be introduced under the general issue.

The objections were sustained, and the testimony excluded, to which ruling of the court the defendant, by his counsel, reserved a bill of exceptions. Judgment was rendered in favor of the plaintiff, and the defendant has appealed.

We think that under the general issue the defendant was clearly precluded from introducing evidence to show that the waiver of protest was made under conditions which the plaintiff failed to comply with. The general denial of the defendant only put at issue the allegation of the plaintiff, that a waiver of protest was made by the defendant. He could go no further than to traverse the fact whether a waiver of protest was or was not made. See 9 Annual, p. 119, and cases there cited. We think, therefore, the exception was properly sustained.

It has been settled by the general current of our decisions, that a simple waiver of protest does not dispense with demand and notice. If the waiver in this case is to be considered as a waiver also of demand and notice, that consideration must arise from a state of facts and attendant circumstances surrounding it, which are materially different from those under which waivers are generally made. Ordinarily, they are made at a considerable length of time before the maturity of the bill or note; at all events, in most instances, prior to the day on which they fall due. The words used, it may be said, must have the same meaning whether used on the day of the maturity or previously. Yet, it is not easy to avoid a freer construction of the terms employed in reference to an act, when they are used almost at the time the act itself is to be performed, than when used at a time more remote. It was doubtless under these impressions that this court, in the case of *Cammena v. Mix*, 15 Louisiana Reports, p. 166, where the indorser of a note wrote upon it the very day it became due. "I hereby waive the formality of protest, and hold myself equally bound," announced its opinion that the indorser was not entitled to any further notice of the dishonor of the note, and rendered judgment accordingly. In the case before us, the words "we waive protest" were written on the day the note fell due, and within less than four hours of the usual time of day for making protests. Considering the circumstances attending the act, the inference naturally and fairly presents itself that the waiver was made upon agreement personally with the holder of the bill, or an authorized agent who had made a presentment and demand of payment; and that it was made with the knowledge of the indorser that the drawee had failed to pay the bill, and on the condition that no protest should be made. If so, the defendant could not have expected a protest to be made; and consequently, if he acted in good faith, he cannot be presumed to have reserved the right to be served with notice of protest.

Standing as we view it, on a different state of facts from those connected with the frequent decisions rendered subsequently, we do not regard the case referred to in fifteenth Louisiana Reports as being over-

Alanson Marsh v. Jedediah Waterman.

ruled by the later cases; and we conclude that the one now under consideration being identical with that in fifteenth Louisiana, should be decided in the same manner.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs in both courts.

No. 1607.—THE CINCINNATI INSURANCE COMPANY v. WILLIAM C. HARRISON and GEORGE D. HITE.

A brought suit against B on a promissory note for \$590 before the trial. A filed a supplemental petition, alleging a statement of account between A and B, which he makes a part of the supplemental petition, and alleges that C, a third party, binds himself as surety of B on the indebtedness, as shown by the statement. The agreement was offered in evidence on the trial by A, and showed an indebtedness of \$371, for which C became security. Held—That C was only bound as security for the amount shown to be due by the statement, and A having alleged that the agreement more fully shows the state of the case at the time the supplemental petition was filed, and having offered it in evidence on the trial, he was not entitled to recover more than the agreement showed to be due from B.

A PPEAL from the Sixth District Court of New Orleans. *Duplantier, J. Hornor & Benedict*, for plaintiff and appellee. *L. Madison Day*, for defendants and appellants.

Howe, J. The original petition in this case, filed February 23, 1866, demanded from the defendant, Harrison, the amount of \$590 62, with interest, upon a promissory note, of which he was maker.

A supplemental petition, filed October 16, 1867, alleged that after the institution of the suit the defendant, Harrison, in consideration of an extension, promised to pay the claim in full, and the defendant Hite took cognizance of this agreement, and bound himself *in solido*, with Harrison for its faithful performance; that on the fourteenth September, 1866, in consideration of the sum of \$19 01 paid by Hite, a further extension of six months was granted, which had expired, "all of which," the plaintiff continues, "will more fully and at large appear by reference to the said contract and agreement, which is hereto annexed as part hereof, and marked A," and judgment was claimed *in solido* against both defendants for the amount of the note, less the sum of \$19 01 paid on account by Hite.

The defendants excepted to these petitions on the ground that there was no such corporation as the Cincinnati Insurance Company; but the case having been tried upon the merits, without the court having passed, or having been asked to pass on the exceptions, they must be considered to have been abandoned.

Upon the trial the plaintiff put in evidence the note sued on, and the "agreement and contract marked A," and the court having given judgment *in solido* against the defendants for \$590 62, with interest, etc., as claimed, subject to a credit of \$19 01, the defendants appealed.

We have not been favored with any brief or argument by appellants, but an examination of the record constrains us to the conclusion that the judgment must be reduced in amount.

The Cincinnati Insurance Company v. William C. Harrison and George D. Hite.

The agreement marked "A," which is made part of the supplemental petition, and is therein stated to more fully show the state of the case at the time the supplemental petition was filed, October 16, 1867, consists in part of a statement by Harrison of his indebtedness to several insurance companies, and among others the following:

"*Sixth*—To Cincinnati Insurance Company, Cincinnati, as per bill F, \$371 55. Interest at six per cent. from twentieth May, 1861, till paid."

Harrison then agrees to pay this claim and the others in full, at the termination of the extension. Hite then binds himself as surety for the faithful performance of this agreement, and lastly follows the further extension signed by the plaintiff's attorneys.

It is perfectly clear that Hite was bound as to this plaintiff only for \$371 55, with six per cent. interest from May 20, 1861; and inasmuch as the agreement was pleaded by the plaintiff, produced from its possession, declared to represent the state of affairs between the plaintiff and the defendants, a few days before the trial, and by the plaintiff put in evidence on the trial, we do not think that even as against Harrison the judgment should be for any larger sum.

It is therefore ordered and adjudged that the judgment appealed from be amended by reducing the same to the sum of three hundred and seventy-one and fifty-five one-hundredths dollars, with interest at six per cent. per annum from May 20, 1861, till paid; that as thus amended it be affirmed, and that the appellee pay the costs of this appeal.

No. 2164.—CITIZENS' BANK OF LOUISIANA v. PAYNE & GILMAN. J. T. MICHEL, Sheriff, Garnishee.

A garnishee must stand aloof from the litigating parties, and not lend himself to the advantage of either party.

An *ex parte* order of court directing the payment of money does not bind a party entitled to the proceeds of the sale of property sold under execution; nor will it protect the sheriff.

The sheriff cannot pay out funds in his hands derived from the sale of property under execution which is subject to conflicting claims on his own authority.

Where it is shown that the sheriff had knowledge of the superior mortgage claims to the funds in his hands arising from the sale of property under execution, and he pays over the funds to another claimant of inferior grade, he becomes personally and officially liable to the creditor of superior rank for the amount thus illegally paid.

A PPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. B. C. Elliott and A. Pitot*, for plaintiff and appellant. *A. Cazabat and W. S. Scott*, for defendants and appellees.

TALIAFERRO, J. This is an action brought against the sheriff of the parish of Jefferson, to render him liable to the plaintiff for an alleged misapplication of certain moneys which came into his hands as sheriff, and to which the plaintiff lays claim. Judgment was rendered in the court below in favor of the sheriff, and the plaintiff appeals.

Delachaise, as vendor to Thompson of two lots of ground in the parish of Jefferson, to enforce payment of the price, sued out execu-

Citizens' Bank of Louisiana v. Payne & Gilman. J. T. Michel, Sheriff, Garnishee.

tory process under his mortgage, having the pact *de non alienando*, and caused the property to be seized in possession of Payne, the vendee of Thompson. After the usual proceedings were taken the two lots were sold for cash, and after paying off the vendor and first mortgagee there remained in the sheriff's hands \$1663 79 subject to subsequent mortgages, of which the judicial mortgage in favor of the Citizens' Bank took precedence, the vendor's mortgage being extinguished by payment.

The attorney of the bank, who was also attorney for Gettzinger, a judgment creditor, filed a rule in the District Court on the twentieth of July, 1867, and an order followed directing the sheriff to show cause why he should not distribute the money remaining in his custody, first to the Citizens' Bank one thousand dollars, with interest and costs, in right of their judgment against Payne and the resulting general mortgage. Secondly, to Joseph Gettzinger seven hundred and sixty-one dollars and thirty-one cents, with interest and costs to discharge his judgment and judicial mortgage.

On the twenty-ninth of November following this rule, upon the motion of the attorney of the bank, was withdrawn. As it is important to notice the circumstances under which the rule was withdrawn, and in connection therewith the events which immediately succeeded, it will be proper to recur to such parts of the testimony as throw light upon this branch of the subject. The testimony of the bank's attorney, who withdrew the rule, was taken under commission. He deposed as follows:

"On the trial of a rule taken by the Citizens' Bank of Louisiana in the suit of Delachaise v. Thompson, on the sheriff, to show cause why he should not pay to said bank the amount of its judgment against Payne, out of the funds in his hands, I was convinced by the argument of my adversary that the most proper course was to take a *fi. fa.* on the judgment in favor of the bank, and seize the money in the sheriff's hands. I then informed the court in presence of Mr. Michel, the sheriff, that I would discontinue my rule in the case of Delachaise, and that I would immediately take a *fi. fa.* in the case of the Citizens' Bank v. Payne & Gilman, and I then called the attention of said sheriff in open court, in the presence of the judge on his bench and the clerk at his desk, to the notice which I then gave him. I then took a *fi. fa.* in the case of the Citizens' Bank v. Payne & Gilman, and drew a petition with interrogations addressed to Mr. Michel. I discontinued my former motion, and handed the petition and interrogations to Mr. Michel at his desk in court, requesting him to accept service thereof in order to save costs. Mr. Michel received the papers, took his pen in hand, and began to write the acceptance of service on the back of the petition. He had already written a word or two when he was called out from the corridor opening on the court room. I am not sure I recognized the person. He left the papers on his desk, telling me, 'my lawyer calls me, let me go and see him.' He left the room. I waited, and then I went out to look for him. I put the papers in the hands of the coroner,

with request to search for him, and at nearly three o'clock P. M., upon being informed that he had left Carrollton long ago, I came back to New Orleans, after having left directions to go and serve him at his domicile."

It is elsewhere in the record shown by the evidence that immediately after the rule was withdrawn the sheriff was called upon in open court, and soon after called outside by the attorney of Payne, and required to pay over the balance of the funds for Payne. This the witness states was done before the opposite counsel took any steps whatever for the bank. The money was paid over to Payne's attorney and a receipt taken. It is shown that on the back of the petition referred to by the testimony of the bank's attorney, the words "service accepted this 29 ——" appear, and it is proved that they are in the handwriting of the sheriff. In answer to the rule taken upon him by the Citizens' Bank (the rule which was withdrawn), the sheriff says: "Respondent denies any knowledge of John Payne's interest in the funds remaining in his hands from the sale effected in the above entitled suit (Delachaise v. Thompson), and requires strict proof of the same; says that he holds the balance of the funds, in his official capacity, subject to the order of the defendant or to the order of the honorable court." The sheriff, in his own testimony, states that he knew of the Citizens' Bank mortgage by the certificate of mortgage, and he acknowledged that the words "service accepted this 29 ——" written on the petition and interrogations, to be in his handwriting.

The sheriff, we think, was clearly at fault. He knew of the bank's judicial mortgage and also of that of Gettzinger. He knew that both these creditors were entitled to be paid from the money in his hands, the proceeds of the mortgaged property, before the residue, if any, could go to Payne. He had ignored, in his answer to the rule, the pretensions of Payne to an interest in the funds remaining in his custody, and declared that he held them subject to the order of the defendant, Thompson, or of the court. He was the legal custodian of the funds subject to the claims of creditors having mortgage rights, a mere stake holder, and under the state of facts existing, unauthorized to pay out these funds without an order of court. He is not shielded in making the payment to Payne by the withdrawal of the rule taken upon him by the bank, because he knew that it was no abandonment by the bank of its rights; on the contrary, he knew that the withdrawal was made for the purpose of directly and immediately pursuing their claims in the form of execution and garnishment, and he was in the act of waiving service of the substituted process when he was called off by his lawyer. In answer to a question as a witness, propounded, as it seems, by the attorney of Payne, he said: "No service whatever was served on me before I paid you; but I heard Mr. Pitot say he was not done with the case."

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We think he has made himself liable to the plaintiff from the course he has pursued. The business of a garnishee is to stand aloof from the litigatory parties, and to bind himself to the separate interest and advantage of neither. He was entirely without right, under the circumstances of the case, to give the funds in his hands any other destination than that intended by law, and to be directed by order of court.

It was held by this court in the case of *Dellassie v. Cenas and others*, 4 N. S. 509, that an *ex parte* order of court directing the payment of money, does not bind a party entitled to the proceeds of sale of property sold under execution, nor protect the sheriff. *A fortiori* the sheriff cannot pay out funds subject to conflicting claims on his own authority.

Numerous authorities are to the same effect in regard to the distribution of the proceeds of mortgaged property. 5 Rob. 272; 7 R. 73 and 303; 7 An. 123; 8 An. 464; 14 An. 654.

We are not satisfied from the evidence in this case, that the money was actually paid over by the sheriff. We think the plaintiff entitled to a reversal of the judgment.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the plaintiff, the Citizens' Bank of Louisiana, have and recover from John T. Michel, the garnishee in this case, in his individual capacity and in his official capacity of sheriff, the sum of one thousand dollars, with interest thereon from the nineteenth of January, A. D. 1861, until paid, at the rate of five per cent. per annum, and that the defendant and appellee pay costs in both courts.

Rehearing refused.

21	383
116	870

No. 1514.—JAMES COULSON v. J. MADISON WELLS, JACOB HABER, called in warranty.

In a judicial sale of real estate, the petition, judgment, notice of judgment, seizure, and notice to appoint an appraiser, together with the Sheriff's deed were shown in a suit to annul the sale. Held—That the title was sufficiently made out without showing the *fi. fa.* and the Sheriff's return.

Where community property has been sold and the proceeds applied to the payment of community debts for which it was mortgaged, the minors cannot claim restitution *in integrum* without showing injury from the sale, and paying or tendering the amount which has inured to their benefit.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Cazabat, J. N. Commandeur*, for plaintiff and appellant, *D. O. Labatt and Marr & Foute* for defendants and appellees.

TALIAFERRO, J. The plaintiff brings this suit to annul a sheriff's sale of three lots of ground with buildings and improvements upon

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them situated in the town of Carrollton, and which were purchased by the defendant, Wells. He avers that the property so sold was community property of the community between himself and wife, who it seems was not living at the time of the sale which he seeks to set aside. He alleges that the property was sold for less than one-third of its value. He institutes the action in his own right and in right of his minor children, whom he represents as their natural tutor. The defendant, Wells, called in warranty, Jacob Haber, the seizing creditor, and made a general denial of the plaintiff's allegations. He alleges that he has expended in valuable improvements made by him on the property sued for the sum of \$3435, for which sum if he be evicted, he claims to be reimbursed by the plaintiff in his own right and as natural tutor to his minor children. That he paid \$1240, the price at which the property was adjudicated to him, and in the event of eviction, he claims to be reimbursed that amount by the plaintiff Coulson, the seized debtor, and Jacob Haber, the seizing creditor, and these amounts he pleads in reconvention to the demand made against him.

Haber, called in warranty, put in a general denial. He avers that his judgment against Coulson was founded on a debt owing to him by the community between the plaintiff and his deceased wife—denies that Coulson can either in his own right or as natural tutor of his minor children recover the property sued for without reimbursing the community debts, for which it was sold, and for which the proceeds were applied. He denies the right of the defendant Wells to recourse upon him before first exhausting the property of the judgment debtor.

Judgment was rendered for the defendant and the plaintiff has appealed.

We ascertain from the record that the plaintiff's wife died in March, 1862, that in May following he applied to the proper court to be recognized as natural tutor to his minor children and to have an inventory made.

He was confirmed as natural tutor, and an under tutor was appointed on the fourteenth of May, 1862. No further proceedings regarding the succession were taken until September, 1865, when an inventory was made. During the same month the plaintiff in a petition addressed to the Judge of the Second Judicial District, set forth a large amount of indebtedness of the community that existed between himself and his deceased wife, and prayed for a sale of property to provide means for the payment of the debts. He prayed the convocation of a family meeting to deliberate upon and fix the terms of sale. A meeting of the family was convened and it advised certain specific property to be sold, and presented the terms. We do not find that any further action was taken in the matter.

The warrantor, in May, 1863, brought suit against the plaintiff in this case and obtained judgment against him on the twenty-ninth day of that month. Under this judgment the property the plaintiff is

James Coulson v. J. Madison Wells, Jacob Haber, called in warranty.

seeking to recover was sold on the twentieth of August of the following year, 1864.

The only illegality in the sheriff's sale alleged by plaintiff is that the property was sold for less than one third of its value. The evidence seems to be that the property was appraised to one thousand dollars, and that it sold for twelve hundred dollars. The proceedings in the judicial sale appear to have been regularly conducted. The execution and sheriff's return are not shown among the evidence. Schaffer, the then sheriff of the parish of Jefferson, sworn as a witness, testified that the execution was not to be found after diligent search for it in his office. The petition, judgment, notices of judgment, seizure, and notice to appoint an appraiser, together with the sheriff's deed, are all shown. We consider the title to be sufficiently made out. 17 La. 40.

This judicial sale we do not feel authorized to regard as a mere nullity. The original debt for which the judgment was rendered, it is clearly shown, was a community debt, and that the proceeds were applied to the payment of that debt and another community debt bearing mortgage on the property sold. This application therefore inured to the benefit of the minors, and they ought not to claim restitution *in integrum* without showing injury from the sale and repaying or tendering the amount which has inured to their benefit. 3 La. 544; 9 La. 305; 13 An. 213; 8 L. 177; *ibidem*, page 440.

The case was dismissed in the lower court as of non-suit, and we think the ruling correct.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 1619.—JOHN GLENN v. THOMAS FERGUSON.

To enable a party to recover damages for a breach of contract of sale, he must show that a sale was actually made.

A lease for hire of a pair of horses and buggy, at a stipulated price per day, is not a sale.

APPEAL from the Fifth District Court of the city of New Orleans. Léaumont, J. F. G. Chamberlain, for plaintiff and appellee, Breaux & Fenner, for defendant and appellant.

LUDELING, C. J. The plaintiff sued the defendant for \$1572, one thousand thereof being for damages resulting from a breach of his contract, and five hundred and seventy-two dollars being the amount alleged to have been paid by him to the defendant on account of the purchase. He alleges that Thomas Ferguson sold him a carriage and horses for the price of \$1800, payable in installments of not less than eight dollars per day; and that he was deprived of the property unlawfully by Ferguson forcibly taking and keeping possession of the same.

John Glenn v. Thomas Ferguson.

The answer contains a general denial and the further allegation that the carriage and horses were hired to plaintiff on the terms and conditions set forth in a written agreement annexed.

There was judgment in favor of the plaintiff for \$1572, with interest and costs.

The plaintiff denied, under oath, his signature to the agreement annexed to the answer. After a careful comparison of the signature to the original contract with the acknowledged signatures of Glenn, which are in the record, we are satisfied it is genuine; and are supported in this conclusion by other evidence in the record.

Glenn has failed to prove a sale of the carriage and horses. It is true, several witnesses testify to having heard Ferguson say that he had sold the carriage and horses to Glenn; but these declarations are more than rebutted by the facts that the property alleged to have been bought by Glenn remained in the possession of Ferguson, and that when they disagreed Glenn went off, leaving the carriage and horses in Ferguson's possession. He made no effort to get possession of the property. Another significant fact is that in his account Glenn charges Ferguson fourteen dollars paid by him for repairs of the carriage and harness, after the time when he alleges he had bought them. Why should Ferguson pay for repairs made on Glenn's carriage and harness? Aside from this, the evidence preponderates in favor of the defendant. Glenn alleges there was a written act of sale, but he failed to produce it, or to account for its non-production. Ferguson swears that the only agreement between the plaintiff and himself is evidenced by the document annexed to his answer. The statements of Ferguson are corroborated by the hostler who was present when an agreement for hire was made between the plaintiff and defendant.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that there be judgment of non-suit against the plaintiff. It is further ordered that he pay the costs of both courts.

Rehearing refused.

No. 1634.—WIDOW ANNA PIPER v. THE SUCCESSION OF JAMES A. PICKENS.

Where the appellant fails to appear and prosecute the appeal, and the record discloses no grounds of appeal, damages will be awarded the appellee as for frivolous appeal.

A PPEAL from the Second Judicial District Court, parish of Jefferson.
Dugué, J. W. S. Scott for plaintiff and appellee, *Fellows & Mills*, for defendant and appellant.

TALIAFERRO, J. This is an appeal from an order of seizure and sale granted on the petition of the plaintiff, and founded upon a promissory note for the sum of \$1300, executed by James A. Pickens, since deceased, in favor of plaintiff, that being an unpaid portion of the price

Widow Anna Piper v. The Succession of James A. Pickens.

of certain real estate in the parish of Jefferson, sold by the plaintiff in July, 1866, to the decedent. The payment of the note is secured by mortgage, imparting confession of judgment.

This case was submitted without oral argument by the counsel on both sides. We have no brief or written argument on the part of the defendant. On the part of the plaintiff it is alleged that the appeal was taken merely for delay, and we are asked to award five hundred dollars as damages for a frivolous appeal. The proceeding *via executiva* seems to be regular, and no reasons or grounds are stated for taking the appeal.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed. It is farther ordered that the plaintiff recover from the defendant the sum of one hundred dollars as damages for a frivolous appeal. The defendant and appellant paying costs in both courts.

No. 1632.—HENRY HEUCHERT v. JACQUES BARRERE.

A lumber dealer cannot recover from the proprietor, who is having a building erected under contract, the price of lumber which he has furnished to the builder, unless he shows that the proprietor is indebted to the builder.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Dugué, J. V. H. Ivy and N. Commandeur*, for plaintiff and appellee, *C. Dufour and J. Duvigneaud*, for defendant and appellant.

TALIAFERRO, J. This is an action brought by a furnisher of building material against the proprietor to compel him to pay the value of lumber and other articles furnished the architect to erect a building. The plaintiff had judgment in his favor, and the defendant has appealed.

Barrère, the defendant and proprietor, entered into a contract with Maurel, the undertaker, to build a stable of certain specified dimensions, and the contract was entered into before a notary and duly recorded. The plaintiff furnished under contract with Maurel, material to the value of \$853 92, to be used in the construction of the building. Barrère was to pay the undertaker \$1750 for the work, and did pay him half the amount in advance, the other half to be paid when he finished the job. Maurel violated the contract by commencing to construct a much larger building than the one intended by the contract. He discontinued the work before completing it, and the plaintiff put him in delay by a written notice to comply with his agreement. Maurel in entering into the contract gave sureties for the performance of his part of it. It does not seem that the defendant ever took any further measures to recover damages from Maurel. The latter gave the plaintiff an order on the defendant for \$600, which he

Henry Heuchert v. Jacques Barrere.

refused to pay, and on several occasions he declared that he owed \$——, which he would pay when the work was completed according to contract.

The furnisher of material in this instance contracted with the builder or undertaker. The undertaker violated his contract with the owner. He had received one-half the price of the work before he commenced it. We cannot from the evidence in the case conclude that the owner owes the builder anything, and therefore that the plaintiff has no recourse upon the owner to enforce against him the payment of the builder's debt to the plaintiff.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that this case be dismissed as of non-suit, the plaintiff and appellee paying costs in both courts.

No. 172.—D. B. HARRIS v. CUDDY, BROWN & Co.

A settlement made by the agent before the revocation of the power of attorney is binding on the principal.

Where an agent holds a power of attorney by public act, the presumption is that the parties with whom he acts for and in behalf of his principals, have knowledge of his authority to represent them.

APPEAL from the Fifth District Court of New Orleans. *Eggleston, J. Simonds & Fenner*, for plaintiff and appellee. *Alexander T. Steele and J. D. Mayer*, for defendants and appellants.

WYLY, J. In February, 1856, the plaintiff, as surviving partner of John L. Harris, deceased, shipped, after the death of the latter, from their plantation in Bolivar county, Mississippi, three hundred and ninety-nine bales of cotton consigned to the defendants for sale at this place.

On sixteenth March, 1856, the defendants remitted to plaintiff \$8619 41, one-half of the net proceeds of said consignment. The plaintiff has instituted this suit to recover the other half of the proceeds.

The answer admits the receipt of the cotton and the amount of proceeds thereof as alleged, but avers that under the direction of William H. Harris, the brother of the plaintiff, acting under a full power of attorney from him, the defendants paid to plaintiff one-half of the amount in their checks on Duncan, Sherman & Co., of New York, and they paid over the balance of the proceeds of said cotton to the said William H. Harris, as agent of plaintiff. A copy of the power of attorney is annexed to the answer.

From a judgment against them in the lower court, the defendants have appealed.

It appears from the evidence that the defendants credited the account of William H. Harris, who was owing them, with one-half the amount

D. B. Harris v. Cuddy, Brown & Co.

of the proceeds of the cotton and remitted the other half to the plaintiff; that on twenty-third of February, 1856, the plaintiff by authentic act passed before a notary public of this city, appointed the said William H. Harris his attorney in fact, with full powers to receive for him, by suit or otherwise, all sums due him, to buy, sell and perform all acts that he might see proper for his principal in the State of Virginia and other States.

This power of attorney was revoked on twenty-fifth March, 1856, but it does not appear that defendants were notified thereof. It does appear, however, that the settlement with the agent, William H. Harris, was made on the eighth March, 1856, and prior to the revocation of the power of attorney.

Plaintiff made one of the defendants, Shepherd Brown, his witness, who appears from his evidence to have been informed of the existence of the power of attorney from the time it was given. The transaction, however, between William H. Harris and the defendants was had with Mr. Cuddy, the active partner of the firm, who died in a short time afterwards.

The power of attorney was given by public act, and we are bound to presume in the absence of proof to the contrary that the defendants made the settlement with William H. Harris with a knowledge of his authority to represent the plaintiff. Having paid over the proceeds to a party authorized to receive them by plaintiff's power of attorney, we think the defendants should not be held liable. Plaintiff must pursue his unfaithful agent.

It is therefore ordered that the judgment appealed from be avoided and annulled; and it is now ordered that there be judgment in favor of defendants, and that plaintiff pay costs in both courts.

Rehearing refused.

No. 1046.—J. D. O'LEARY v. MARTIN, COBB & Co.

A waiver of protest and notice by an indorser, made at the place of payment, at the moment of maturity, will dispense with proof of other demand.

Where a promissory note is indorsed in blank by a firm name, and a waiver of protest and notice is signed by the same firm, but in a different hand-writing from that of the original indorsement, and the note, indorsement and waiver are all offered and received in evidence without objection, the presumption is that the waiver was written by another member of the firm from that of the indorsement, and the signature will be considered proved.

Where the name of the holder of a promissory note appears as first indorser he will be presumed to be a surety with the maker. This presumption may however be rebutted by proof.

APPEAL from the Fourth District Court of New Orleans. *Théard, J. Hynes, Gordon & Bemiss*, for plaintiff and appellee. *Harrison & Hunton*, for defendants and appellants.

HOWE, J. The plaintiff sues as owner and holder of two promissory notes made and indorsed as follows:

J. D. O'Leary v. Martin, Cobb & Co.

" VICKSBURG, Miss., January 28, 1861.

" \$1137 39.

" Nine months after date, I promise to pay to the order of Messrs. Cobb, Manlove & Co., at the office of Messrs. Martin, Cobb & Co., New Orleans, eleven hundred and thirty-seven dollars and thirty-nine cents, for value received, with interest at the rate of eight per cent. per annum after maturity until paid.

" JAMES P. PORTER."

[Indorsed]

" JAMES D. O'LEARY.

" COBB, MANLOVE & CO.

" MARTIN, COBB & CO.

" We waive protest and notice of same on this October 31, 1861.

MARTIN, COBB & CO."

" RICHMOND, MADISON PARISH, LA., October 17, 1861.

" \$4521 94.

" Sixty days after date I promise to pay to the order of Martin, Cobb & Co., at their counting room in New Orleans, Louisiana, forty-five hundred and twenty-one dollars and ninety-four cents, for value received, with interest at the rate of eight per cent. per annum after maturity until paid.

" D. M. DANCY."

[Indorsed]

" JAMES D. O'LEARY."

" NEW ORLEANS, December 19, 1861.

" We waive protest and notice of protest as indorsers.

" MARTIN, COBB & CO."

The plaintiff seeks to hold the defendants, Martin, Cobb & Co., liable as indorsers.

It will be observed that the notes are payable at the counting room of these indorsers, and on the day of maturity of each respectively, protest and notice of protest were waived by these indorsers.

It will be presumed that these acts of waiver by the firm were done at their counting room. It would seem to result as a logical sequence that the notes must have been presented there at maturity and payment demanded, and, there being no funds of the makers, the waivers were accordingly made. The case is even stronger than *Carmena v. Mix*, 15 La. 165, and *Marsh v. Waterman*, lately decided, 21 An. p. 377. We must conclude therefore that these waivers, made at the place of payment, at the moment of maturity, by the firm whose counting room was the place of payment, dispensed with proof of other demand. Notice is especially waived.

It is contended by defendants that inasmuch as it is admitted on argument before this court that the waiver written over the indorsement on the second note is in a different handwriting from the signature, the waiver remains unproved. The waiver is made part of the petition—it was offered in evidence without objection—the defendants do not allege error or fraud; and after it was in evidence a witness proved that the notes were presented to one of the defendants' firm

J. D. O'Leary v. Martin, Cobb & Co.

who admitted the genuineness of the indorsements. Under such circumstances we think it rational to conclude that the waiver was written by one of the partners over the signature by another which had previously been placed on the note.

A more serious question is presented by the fact that the plaintiff's name appears first on the list of indorsers on this paper. So appearing, above the payees, he would be presumed to be a surety with the maker, and to have no right of action except against the maker. The force of this presumption is considerably weakened, however, by the testimony on the part of plaintiff, that his agent presented the notes before suit to one of the defendants' firm, and that negotiations for a settlement were entered upon although never completed.

Under such circumstances justice requires that the case should be remanded that the position of plaintiff's indorsement may be explained.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed, and that the case be remanded to be proceeded with according to law, and that the appellee pay costs of appeal.

No. 1497.—Succession of JEAN JOURNE, on a rule taken on the Tutrix and Under Tutor.

The good will of a stall or stand in the public market places of the city of New Orleans is something independent of the stand itself and belongs to the party who leases the stall or stand. If a lessee of a market stall or stand dies, the property in the good will of the stand falls into his succession.

A PPEAL from the Second District Court of New Orleans. *Thomas, J. Budd & Murphy*, for appellee. *Saucier & Michinard*, for appellant.

TALIAFERRO, J. In this case a paternal uncle offered the account and tableau of the tutrix of his deceased brother's minor children on the ground that, to the minor's injury the tutrix had failed to place upon her inventory and account an item of \$1700, money which, in part, she should have accounted for as belonging to the minor. This claim of the opponent set up in the interest of the minor is founded on the following state of facts. Jean Journé, husband of the tutrix and father of the minor, was by occupation a butcher, and occupied for some time previous to his death, which happened in the latter part of August, 1866, a stand or stall in one of the markets of the city for vending butcher's meat. During his last illness and after his decease the stall was occupied by a man in attendance, and the charges or dues were paid by Bernard Delord, a brother of the tutrix, also a butcher occupying a stall of his own in the same market. About three month's afterward Delord sold out the privileges and use of the stall to Victor Bowras for \$1700 and appropriated the money to his own use. The opponent contends that the proceeds of this sale rightfully belong to the community that existed between the tutrix and Jean Journé. It does not appear that the tutrix ever claimed anything on this account, or that she ever received any of the money arising from the sale made

21	391
44	207

21	391
48	714

21	391
116	648

by Delord. It is held in defense that the succession can hold no right whatever to the use or the privileges of the stall occupied by Journé in his lifetime; that the obligation was one strictly personal as to him and not heritable; that at his decease the right of the city, through its agents, to rent the stall to any applicant instantly arose; that Delord obtained the use and privileges of the stall from one of the farmers, as they are termed, of the market stalls, and that he is in no manner affected by any pretended right claimed for the succession.

It seems that there exists a custom or common usage in dealing in these matters, of transferring, by consent generally of the farmer, the use of market stalls, and with that transfer of selling the "good will" also of the stand, by which is understood the run of custom which the transferrer had attained by the patronage of his friends resorting to his stand to purchase, and generally from the reputation his stand had acquired as one at which good and wholesome meats were sold, and where customers were accommodated and fairly dealt with. When Jean Journé obtained the stand he gave \$1350 for the "good will," and Delord sold the "good will" for \$1700. The good will is a thing strictly belonging to the party leasing from the city, and with which neither the city nor its farmers or agents have anything to do.

On the trial of the case in the lower court the judge gave judgment in favor of the opponent, ordering the tutrix to place the sum of \$1700 upon the inventory of the succession, the value of the stall, this sum belonging to the community, one-half to the tutrix in her own right and the other to her minor children. After an unsuccessful effort to obtain a new trial the tutrix took an appeal.

If the lease terminated at the death of Journé, and his widow and heirs had no right to continue and use the stall, what is called the "good will" was something they were entitled to, if it could not be made available, and we are not sure that it could not have been. This equitable right did not cease to exist because it was not practicable to derive benefit from it. But what rights did Delord acquire subsequent to the decease of Journé? His whole course in relation to the matter after the decease of Journé seems not to have been of that clear and straightforward character which would have rendered his intentions manifest. Journé's partner in the purchase of beeves, etc., for the market, engaged a man to attend the stall during the last illness of Journé to avoid a forfeiture of the lease which, by a city ordinance, would have terminated had three days passed without an attendant at the stall. During this period Delord paid the required dues to the farmer as they became exigible, and did this for Journé. After Journé's death, Delord continued to pay the dues, in whose right does not seem entirely clear. Negalona, an agent or representative of the farmer, testifies that he gave orders to his collector to give possession of the stall to Delord, and that Delord paid dues for himself and not for the succession. He

Succession of Jean Journe, on a rule taken on the Tutrix and Under Tutrix.

says also that he paid the dues but did not take possession, that a young man named Paul occupied the stall, that he did not know for whom he occupied it. He said that according to the *custom* of the market the stall belonged to the farmer when the occupant died, and afterward when interrogated as to how he knew such to be the custom he replied that he knew nothing of *customs* that he claimed under the ordinances. This is the most important witness on the part of the defense, and we can not but think his testimony vague and unsatisfactory. He gives no clue as to the time when he authorized Delord to take possession of the stall, and leaves us equally in the dark as to when he ceased to pay dues on account of others, and when he began to pay them for himself—an important fact in the case. On the other hand it is sufficiently clear that his manner was such as to induce others to suppose that he was paying these dues for the benefit of the estate of his brother-in-law. Paul was in attendance at the stall, but neither Negalona, who says he authorized Delord to take possession of it, nor, as far as shown, any other person knew for whom Paul was occupying. Bowras, who bought from Delord, was induced to believe that Delord was acting in behalf of the widow of Journé, for Bowras proposed going to see the widow in relation to the transfer, but was told by Delord that it was not necessary, leaving the impression that he was authorized to act, but he did not tell him that he was the owner. Bowras, in his testimony in the case, says that Delord never occupied the stall for himself. It is well established that Delord never had possession of the stall personally. He never complied with one of the important requirements of the city ordinances, that of posting up his name over the stall. In getting this dubious control of the stall he gave nothing to anybody for “good will,” but after the period of about three months he suddenly transferred the stall to Bowras, and sold him the “good will” for \$1700.

Now, what good will did he sell? It was not that of his own stall in the same market where he continued to pursue his occupation. During his quasi management of the stall, formerly Journé's, for the brief period of three months without having posted his name over the stall, as required by the city ordinance, and never occupying it himself in person, he could not have acquired on his own account any appreciable amount of additional patronage or good will for that stall. But it is said that upon the death of Journé the good will that appertained to his stall ceased, and that nothing of the kind could have gone to his heirs. This position is not tenable. It is not exclusively to the person that what is termed the “good will” is attached, but it is chiefly to the place. The patronage and custom bestowed upon this stall was estimated to be worth \$1350 when Journé got it, and he paid the \$1350 for the good will. This belonged to him at his death, and upon principles of equity at least it should, if practicable, be made available for his

Succession of Jean Journe, on a rule taken on the Tutrix and Under Tutrix.

minor children, at all events their half of it. If the mother and tutrix thought proper to waive and decline her own rights in the premises, she certainly was not justifiable in sacrificing those of the minors.

From these considerations we conclude that the judgment appealed from was properly rendered.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs in both courts.

No. 2128.—Succession of E. M. YOUNG, on Opposition to Appointment of Executor.

A tutor residing in a foreign country or in another State of the Union can not receive letters of tutorship from the courts of Louisiana, nor be recognized as testamentary executor without first giving bond and security under such conditions as are required by law from dative testamentary executors. Acts of 1842, sec. 5, page 302.

A PPEAL from the parish of St. Helena, Sixth Judicial District. George, Parish Judge, presiding. *McVea & Hunter* and *J. E. Wilson*, for appellant, *T. & J. Ellis*, for executor, appellee.

TALIAFERRO, J. The appellee moves the dismissal of this appeal on the following grounds, viz:

First—There is no final judgment appealed from, but a mere motion only upon which there was no citation, no service nor delay, no *contestatio litis*. That the motion concludes nothing.

Second—If the appeal would lie, the appeal bond is defective, being in favor of the *Clerk of the Parish Court* of the parish of St. Helena, there being legally no such officer.

Third—The certificate is not signed by the judge but by a person styling himself *Clerk of the Parish Court*, there being constitutionally no such officer.

An examination of the record shows us that the motion of the appellant in the lower court to be appointed dative testamentary executor of the succession of E. M. Young, on the ground that Huston, the foreign executor, had not complied with the law by entering into bond, was opposed by Huston, who introduced rebutting evidence, and thus accepted the issue tendered him. He thereby waived the formality of being proceeded against by petition and citation. This ground for dismissal is therefore insufficient. The objection to the bond and certificate we think without weight; the clerks of district courts are by law required in certain cases to perform the duties of clerks in the parish courts. The motion to dismiss is therefore overruled.

On the merits there is only the simple question, whether a foreign tutor is required by the law of Louisiana to furnish security? The act of the Legislature of 1842 is express on this subject: "Whenever the testamentary executor named in the will shall be present in the State, but domiciled out of it, the judge shall only grant him the letters on the execution of his bond with a good and solvent security for

Succession of E. M. Young, on Opposition to Appointment of Executor.

such sum and under such conditions as are required by law from dative testamentary executors." We think the judge *a quo* erred in recognizing Huston as executor without requiring from him bond and security in conformity with the act just recited; and that in consequence thereof the appointment is void. A case is presented in which the judge is required to appoint a dative testamentary executor according to the fifth section of the act of 1842, page 302.

It is therefore ordered, adjudged and decreed that the judgment of the lower court dismissing the application of John L. Young to be appointed dative testamentary executor of the estate of E. M. Young, deceased, be annulled, avoided and reversed. It is further ordered that the judge *a quo* proceed to the appointment of a dative testamentary executor in pursuance of the fifth section of the act of the Legislature, approved sixteenth of March, 1842, entitled "An act explanatory of the nine hundred and twenty-fourth article of the Code of Practice for the administration of the succession of strangers dying possessed of property within the State of Louisiana, and for other purposes. The defendant and appellee paying costs in both cases.

Rehearing refused.

No. 2133.—A. S. MANSFIELD, E. E. NORTON, Assignee, v. Mrs. M. L. DOHERTY et. als., CITIZENS' BANK et. als., Intervenors.

Prescription must be pleaded expressly and specially in order that the party against whom it is urged may have full notice to meet it. C. C. 3426, 3427.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Cooley, J. W. D. Winter*, for plaintiff and appellant, *Collins & Leake*, for defendants, *Wickliffe & Fisher*, for intervenors.

HOWE, J. The plaintiff sued the defendants, Mrs. M. L. Doherty, widow of Patrick Doherty, and Mrs. M. Ross and Miss Mary Doherty, issue of Patrick and Margaret L. Doherty, for a balance due on a mortgage note of five thousand dollars, with recognition of mortgage on certain property described in an act executed by defendants on the thirty-first December, 1866. The Citizens' Bank and others intervened, representing themselves to be creditors of Patrick Doherty, and entitled to be paid from the property of his succession in preference to the individual creditor of the heirs. The defendants pleaded the general issue, and specially averred that the property mortgaged belonged to the estate of Doherty, deceased, and that they were not authorized to mortgage it to the prejudice of the creditors of the succession. The plaintiff in response to the intervention pleaded the general issue, and specially denied the leading averments of the intervenors, and furthermore, "that the action of intervenors to make said property liable for the debts of the succession, if any they ever had, is barred by prescription."

Judgment was rendered in favor of plaintiff for a portion of his

A. S. Mansfield, E. E. Norton, Assignee, v. Mrs. M. L. Doherty et al., Citizens' Bank et al.,
Intervenors.

claim with interest and with recognition of mortgage on the land proved to be the paraphernal property of Mrs. Doherty, and in favor of intervenors against plaintiff, rejecting his claim of mortgage on the remainder of the property comprised in the act of mortgage, but proved to belong to the succession, and the plaintiff appealed.

The only question that seems to be presented on this appeal is whether the action of the intervenors should be declared to be prescribed. It is claimed by plaintiff in his brief that he pleaded the prescription of three months as to an action of separation of patrimony. To this the intervenors and the defendants reply that the plea above quoted is so vague and indefinite that it amounts to no plea at all, that they are at a loss to conjecture which of the manifold prescriptions is intended to be pleaded, and that it was properly disregarded by the court below.

We can not supply the plea of prescription. It should be pleaded, if at all, expressly and specially before the final judgment. C. C. 3426, 3427. The party against whom it is urged should have full notice to meet it, for it may be met in various ways. And in a case of this nature it ought to be entirely explicit. 15 La. 550.

We are of opinion that the court *a qua* did not err in considering the plea as not made in this case, and it is therefore ordered that the judgment appealed from be affirmed with costs.

21	396
44	839
21	396
49	229
21	396
114	823

No. 2113.—CITY NATIONAL BANK v. ELIZA E. BARROW and Husband,
A. MILTENBERGER & Co., Intervenors.

The signature of the husband to a note and mortgage to secure its payment, executed by the wife, is a sufficient authorization by the husband for the endorsement of the note by the wife.

Where an act of mortgage declares the object mortgaged to be the entire interest in a certain parish named, giving the number of acres, and mentioning the river on and near which it lies, and by which it is bounded, with a reference to certain titles of the mortgager to be found in the office of the Recorder of Mortgages for the parish, the description of the property is sufficient. 2 An. 263, 371.

APPEAL from the Seventh Judicial District Court, parish of West Feliciana. *Cooley, J. Race, Foster & E. T. Merrick* and *S. J. Powell*, for plaintiff, *Campbell, Spofford & Campbell* and *Collins & Leake*, for defendants.

HOWE, J. This action was brought to recover the amount of three promissory notes, in all the sum of \$10,000, drawn by Eliza E. Barrow, to the order of herself and by her indorsed in blank, dated November 25, 1865, and secured by mortgage on the following described property.

"Her entire landed interest in the aforesaid parish of West Feliciana, situated on and adjacent to the Mississippi river, and composed of thirty-eight hundred acres of land more or less, as per acts of sale to be found at my (the parish recorder's) office in the town of St. Francisville, parish aforesaid."

City National Bank v. Eliza E. Barrow and Husband, A. Miltenberger & Co., Intervenor.

The plaintiff asked also that its mortgage be recognized and enforced upon eight tracts of land specifically described in the petition and alleged to compose the property embraced in the very general description quoted above.

It appears that Mrs. Barrow was separated in property from her husband by judgment of February 25, 1853. The notes and mortgage are signed by her husband, apparently for the purpose of authorizing her execution of them.

A. Miltenberger & Co. intervened, setting up a general mortgage on these lands in virtue of a judgment against Mrs. Barrow, recorded June 16, 1866, and averring the insolvency of Mrs. Barrow, and the nullity of the notes on which the plaintiff's action was brought. They alleged that no consideration was paid for them to Mrs. Barrow, or to any one for her separate benefit, that she was not authorized to indorse them; that the mortgage does not comply with the provisions of the law of 1855, authorizing married women to contract debts and mortgage their property, and that the mortgage does not state the precise nature and situation of each of the immovables on which said mortgage is granted.

They prayed that the notes might be canceled and annulled.

The plaintiffs filed the plea of prescription of one year to this intervention, it having been filed December 23, 1867, but this plea the court properly overruled. The plaintiff sues to enforce a mortgage claimed to be prior to that of intervenors. The latter claim that it is no mortgage, by reason of sundry alleged nullities, and they further urge, as will be seen hereafter, that it can, at any rate, only affect a portion of the lands of Mrs. Barrow which the bank aims to make subject to its grasp. The action of the intervenors seems to be something more than the action of nullity mentioned in the Civil Code in articles 1965 to 1989 inclusive.

There was judgment in favor of plaintiffs for the amount of one of the notes, \$3333 33, with interest as claimed, and with recognition of mortgage as claimed on the eight tracts of land described in the petition, and in favor of defendants and against the plaintiff as in case of nonsuit as to the other notes, and the claim of intervenors was dismissed.

The intervenors only have appealed.

So far as the question of consideration is concerned the judgment as to amount appears to be fully sustained.

As to the authorization of the husband for the indorsement in blank by the wife, we think the requirements of law were met by the signature of the husband to the note and mortgage. It can hardly be necessary to require the husband after authorizing the execution by his wife of a note and its accessory obligation to also give a separate authority for her indorsement in blank which in no manner increases her

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liability, but only carried into practical effect the obligation recognized and secured by the mortgage.

As to the law of 1855, invoked by intervenors, it will be observed that its object is explained in its title, which declares it to be "an act to enable married women to contract debts and bind their paraphernal or dotal property." Act of 1855, page 254.

Its effect is to dispense the creditor, by an observance of its formalities from the obligation which would otherwise exist, and exists in this case, to prove that the money advanced by him was actually applied for the benefit of the wife. See § 3.

But it does not seem to invalidate an obligation contracted, as in this case, by a married woman, separated in property, and authorized by her husband, where the creditor proves that the money advanced was actually received by the debtor for the advantage of her separate property.

The last point made by the intervenors is that the description of the property mortgaged is insufficient. We do not think the point tenable. The description is inartificial, but it can hardly be said to be insufficient. In the first place it declares the object mortgaged to be "her entire landed interest in the parish of West Feliciana;" in the second place it is stated to comprise three thousand eight hundred acres more or less; in the third place it is stated to be on and adjacent to the Mississippi river; and finally it refers to certain titles of the mortgager to be found in the office of the recorder, and to which we will again allude.

In *Ells v. Sims*, 2 Ann. 253, the property was described as follows: "my land situate on the Mississippi river in said parish of Concordia, bounded by lands of E. P. King, above and below, and back by lands of the United States," and this was held sufficient in the following language:

"A distinction may be fairly made between urban and rural estates, and greater minuteness and accuracy of detail might properly be required in the former than in the latter case. The question is whether any one contracting with Sims, or in any wise trusting him, or interested as a creditor, would have been misled or kept in the dark by the omission to state the township, range, section, and *the quantity of acres* in Sims' tract. We think not, and are of opinion that in this case there has been a fair compliance with the requisition of law that the mortgage and its registry shall state precisely the nature and situation of the property."

In *Baker v. Bank of Louisiana*, 2 Ann. 371, the court reiterated the reason of the rule, and held the following description sufficient:

"A certain tract, or a parcel of ground, with the improvements thereon, situate, lying and being in said parish, on the Bayou Tunica, being the land and plantation purchased by the said Samuel Wimbes,

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at the probate sale of Samuel Davis, deceased, containing five hundred and eight acres."

In the case at bar the description, poor as it is, is in one respect better than the one lastly quoted, for it declares the property to be all the mortgager has in the parish, and if we apply the test of notice, it will appear simply impossible that the intervenors could have been misled or prejudiced by what they allege to be an insufficiency of description. The debt due them was contracted in 1861. The plaintiff's mortgage was executed in 1865. The intervenors' judicial mortgage resulted from a confession of judgment in 1866.

It is however urged by intervenors that if this description be held sufficient the extent of the property is limited by the phrase "as per acts of sale to be found in my office in the town of St. Francisville," and can embrace only such lands as were included in the four acts of sale there recorded, and that four patents embracing twelve hundred and sixty-nine and sixty-six one hundredths acres of the land in controversy were not recorded until June 30, 1866, after the judicial mortgage had attached. We think this position untenable.

The mortgager hypothecated her entire landed interest in the parish, and at that time she owned the lands embraced in the four patents. She described it as embracing about three thousand eight hundred acres, and the amount of the eight tracts corresponds with that portion of the description. We regard the reference, "as per acts of sale" etc., not as limiting the previous portion of the description but as merely explaining it *pro tanto*.

It is therefore ordered that the judgment appealed from be affirmed with costs.

NO. 2123.—A. MILTENEERGER v. N. K. KNOX et al., H. M. FAVROT,
Attorney for Absent Heirs, Intervenor.

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The opening of a succession and the appointment of an administrator in a parish where the deceased never has resided, nor owns property therein at the time of the death, are absolute nullities; and any and all proceedings had, and all judgments rendered against the succession are void. C. C. 929; 8 An. 261.

APPEAL from the Fifth District Court, parish of East Baton Rouge.
Posey, J. Cooley & Phillips and Barrow & Pope, for plaintiff and appellant. H. M. Favrot, for absent heirs, appellant. Herron, Fuqua & Callehan, for defendants and appellees.

HOWELL, J. On the seventh July, 1866, the defendant, Knox, obtained a judgment in the parish of East Baton Rouge on a note made by Charles Pipes on seventh June, 1856, due first January, 1861, against Henry Jones, as administrator of the successions of Charles and Winnifred Pipes, deceased, recognizing a mortgage to secure the same and ordering the mortgaged property situated in the parish of

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West Baton Rouge to be sold to satisfy the debt. In September, 1867, he caused a *fi. fa.* to issue on said judgment and the property to be seized, whereupon the plaintiff, A. Miltenberger, as holder of two notes executed on second February, 1860, due at thirteen and fourteen months for \$10,000 each, by the said Winnifred Pipes and her son, Stephen Pipes, and secured by mortgage on the same property, instituted this suit to enjoin the sale and prayed to annul the judgment in favor of Knox and the appointment of Henry Jones as administrator of the successions of Charles and Winnifred Pipes on the grounds, among many others :

First—That the succession of Charles Pipes had been accepted and settled by the heirs years before it was opened by the said Jones in the parish of East Baton Rouge.

Second—That at the time of her death, Mrs. Winnifred Pipes neither resided, died nor owned property in the parish of *East Baton Rouge*, where her succession was opened, but had her domicile and owned property in the parish of *West Baton Rouge*, and died in the parish of *East Feliciana*. Her succession should have been opened either in the one or the other of these parishes.

The defendants, Knox and Jones, filed answers to the petitions of the plaintiff. H. M. Favrot, as attorney for the absent heirs of Charles Pipes, Winnifred Pipes and Stephen Pipes intervened, adopting the allegations and prayer of the plaintiff as against the defendants, Knox and Jones, and setting up a defense to the demand of plaintiff.

As to the first of the above grounds, it is shown that Charles Pipes died in *East Baton Rouge* in 1858 and his succession was accepted purely and simply by his heirs, and all his property in said parish was sold in 1859 to one A. E. Brady, and that situated in *West Baton Rouge* to Stephen Pipes. There was therefore no succession to open, and the rights of any creditors of said Charles Pipes were against his heirs or the mortgaged property in the hands of the possessor. C. C. 1370, 1409 ; 19 A. 60.

The recorder of the parish, appointed in June, 1866, to make an inventory of the property in *East Baton Rouge*, returned that no property was found in said parish belonging to the succession of Charles Pipes, and the return of the recorder of the parish of *West Baton Rouge*, appointed at the same time, contains only property that had been accepted and sold, long before, by the heirs of Charles Pipes.

As to the succession of Mrs. Winnifred Pipes, widow of said Charles Pipes, it is shown that she resided after the death of her husband with Stephen Pipes, in *West Baton Rouge*, until 1862, when she removed to *East Feliciana*, where she died in 1863, and she is not shown to have had any property in *East Baton Rouge*.

The appointment therefore of Jones as administrator of both

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successions in said parish of East Baton Rouge, was a nullity, (C. C. 929; 3 A. 261) and there was no one in court against whom Knox could obtain a judgment in the suit instituted by him. All the proceedings had in the attempt to open the said successions and recover judgment against them, having no legal foundation, were and are absolute nullities, and any creditor or party interested may oppose any process of court resulting from them which may affect their interests.

We need not inquire into the right of the plaintiff and the attorney of absent heirs to set up any other grounds which appear in the record. If Knox has no judgment, he is not entitled to an execution, or to proceed, as he is attempting, against the property in question. Both he and the plaintiff must be left to pursue the legal course to collect or enforce any claims they may have against the deceased debtors.

It is therefore ordered that the judgment appealed from be reversed, and that the appointment of Henry Jones as administrator of the successions of Charles Pipes, deceased, and Winnfried Pipes, deceased, by the District Court in the parish of East Baton Rouge, and all the proceedings in said two successions, be declared null and void; that the judgment in the suit of N. K. Knox v. H. Jones, administrator, No. 940 on the docket of said court, and all the proceedings thereunder be declared null and the seizure set aside. The defendant, Knox, to pay costs of this suit in both courts.

NO. 1641.—STATE OF LOUISIANA ex rel. E. DURRIVE v. RECORDER OF MORTGAGES.

The right to have a mortgage canceled can not be tested before the courts unless all those having an interest be made parties.

The sale of the property of a bankrupt by the assignee does not operate a release of the mortgages and attach them to the proceeds.

A PPEAL from the Fifth District Court of New Orleans. *Lecumont, J. E. Bermudez*, for plaintiff and appellee, *Hornor & Benedict*, for Recorder, appellant.

HOWELL, J. Edward Durrive, alleging that he has been discharged under the bankrupt act of second March, 1867, by the United States District Court, District of Louisiana, from all debts and claims, which by said act are made provable against his estate, and which existed on the twentieth July, 1867, prayed for a mandamus directing the Recorder of Mortgages for the city and parish of Orleans to erase the inscriptions of two judgments rendered against the relator, one on the fourth of April, 1863, in favor of N. Lecanu, James Plaisant subrogated, and the other on the fifth of May, 1863, in favor of Leon &

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André, and duly recorded, both the said creditors having been made parties to the proceedings in bankruptcy.

The Recorder of Mortgages filed several exceptions, of which we will notice the following, although we can see no interest which the relator has in the matter, because the proper parties in interest have not been made parties to these proceedings.

It is well settled that the right to have a mortgage canceled can not be tested, unless those having a real or pretended interest be made parties. 5 L. 329; 6 R. 299; 8 R. 97; 11 R. 177; 2 A. 114. But in the case of *Erwin v. Bank of Kentucky*, 5 A. p. 4, it was held that when the evidence shows that the debt secured by the mortgage has been paid, the original mortgagee has no interest and need not be made a party to the proceeding for the erasure of the mortgage. In this case, however, the record does not show that the judgments in question have been paid; and by the bankrupt act there are certain debts from which and certain contingencies in which the bankrupt shall not be discharged, (sections 29 and 33); and under section fourteen of said act "the assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof or to sell the same, *subject to such mortgage, lien or other incumbrances.*" There is no allegation in plaintiff's petition that these judgments have been paid, and it may be that the property has been sold subject to the judicial mortgages. The bankrupt act does not provide that the sale of the property shall operate a release of the mortgages and attach them to the proceeds. On the contrary, it seems from the above clause that the assignee has authority under the direction of the court only to redeem or discharge the mortgage, or sell the property subject to the same. Section fifteen confirms this view, as it directs that "he shall sell all such *unincumbered* estate, real or personal, which comes into his hands, on such terms as he thinks most for the interest of the creditors." It is manifest that the exception was well taken.

It is therefore ordered that the judgment appealed from be reversed; that the exception of the defendant be maintained, and the proceedings herein be dismissed at the costs of relator in both courts.

No. 1525.—*POWERS & Co. v. SIXTY TONS OF MARBLE.*

Where a carrier of freight for hire stores the property or goods in a warehouse at the port of destination, the charges of the warehouse keeper for storage forms a privilege on the goods superior in rank to that of the carrier for the freight.

A PPEAL from the Fifth District Court of New Orleans. *Leaumont, J. McCay & Luzenburg*, for plaintiffs and appellees. *Gurley & Flower*, for appellant. *E. Hunt*, curator *ad hoc*.

WYLY, J. This is a proceeding *in rem* to recover the amount of storage due the plaintiffs, keepers of a warehouse, on sixty tons of marble, and to enforce their privilege thereon.

The marble was shipped from Boston in December, 1860, by unknown parties, and consigned to Cavanaugh and Cully, at this place, who refused to pay the freight and accept the consignment. Thereupon the same was hauled by the plaintiffs to their warehouse and stored at the request of the captains or consignees of the vessels which transported it.

The owners appear to have abandoned the property, never having offered to pay the freight and storage and to take possession of the same.

On ninth February, 1867, plaintiffs sued to recover the amount due them and to enforce their privilege and pledge on the marble which still remained stored in their warehouse, the court appointing a curator *ad hoc* to represent the absent owners.

George W. Hynson & Co. as ship agents and consignees intervened and claimed the amount due for freight, primage and average on said marble, with a privilege, as they allege, superior to that of plaintiffs.

On the trial the court rendered judgment in favor of plaintiffs for the amount claimed by them, to be paid by privilege and preference out of the proceeds of the sale of the marble, and in favor of the intervenors for the amount claimed by them without privilege.

The intervenors have appealed.

The claims of these creditors are fully established. The owners of the marble owe the full amount of freight due the intervenors, and they also owe the full amount claimed by plaintiffs for storage.

The only question to determine is, which one of these creditors has the superior privilege on the marble or its proceeds?

The intervenors contend that under article 3213 Civil Code they have a privilege on the goods for the freight, the same not having been delivered to the consignees, nor passed into third hands. That having stored it, the marble, in effect, remained in their hands.

They contend the court erred in allowing the plaintiffs a privilege; that a privilege for storage is no where allowed by our laws.

Plaintiffs' claim is for the preservation of the thing. Under articles 3191, 3192 and 3193 of the Civil Code a party is entitled to recover the expenses incurred for the preservation of the property which he has in his possession, "whether in deposit, loan or otherwise;" and he has a right of pledge by which he may, until reimbursed, retain the property.

The evidence in this case establishes that the charges of plaintiffs are reasonable for taking care of and preserving the property which had been placed in their hands for storage.

In Hyams v. Smith, 6 A. 362, it was held by this court that the necessary expenses for boarding and attendance upon slaves seized in a suit and held pending the litigation, constitute a privilege claim on the slaves.

In *Andrews v. Crandell, sheriff et al.*, 16 A. 208, the bill of a livery stable keeper was held to be a privilege claim on the proceeds of the sale of horses by the sheriff.

The privilege in these cases is based upon the principle that the charges were necessary expenses for the preservation of the thing.

In our opinion the court did not err in giving plaintiffs preference to be paid out of the proceeds of the thing preserved by them. The intervenors had the first privilege on the marble for the freight had they seen fit to keep it in their own custody till they were paid. But after permitting it to remain in storage with the plaintiffs for so many years where they placed it, they cannot complain if their privilege must yield to the superior rights of those who have preserved the thing for so long a period.

We think the court erred in not recognizing the privilege of the intervenors on the property in contest, but that their privilege is inferior to that of plaintiffs. C. C. 3229.

It is therefore ordered that the judgment appealed from be amended by allowing the intervenors a privilege next in rank to the plaintiffs to be paid out of the proceeds of the sale of the marble, and as thus amended that the judgment be affirmed.

It is ordered that plaintiffs pay costs of this appeal.

No. 1635.—*MARTIN JONES v. JACOB WORLEY, et als.*

Plaintiff had leased the bar on the steamboat *T. D. Hine* for one year, from the agent of the owner; before the expiration of the lease the boat was purchased by the Captain (*Worley*), who forcibly ejected the lessee from the bar and put him off the boat. He brings suit against the former owner, the former master, and the present owner and master, to recover the damages he had sustained, alleging a conspiracy between these parties to gain possession of the bar. The last owner of the boat pleaded the exception of domicile, which was sustained by the court below, and the suit dismissed as to him. Held—that, the warranty by the vendor only extended to eviction, and could not be extended by the court so as to cover a case of assault and battery; that a conspiracy not being established by the evidence, and the last vendor and present owner of the boat not being before the court in this suit, plaintiff's demand for damages in this suit must fail.

A PPEAL from the Fourth District Court of New Orleans. *Théard, J. Campbell, Spofford & Campbell*, and *Collens & Wooldridge*, for plaintiff; and appellant *Emerson & Grow, Randolph, Singleton & Hardee*, and *Marr & Foute*, for defendants and appelleés.

Howe, J. On the twenty-sixth of August, 1865, Mrs. Mary G. Knorr purchased the steamboat *T. D. Hine*, and A. J. Parmele was appointed master. On the twenty-eighth of October, 1865, Mrs. Knorr, by notarial act constituted J. R. Shannon her agent with full powers. On the twenty-eighth of October, 1865, while the boat lay in her home port undergoing repairs, Parmele claiming still to be the master, made a lease of the bar room of the boat to William Guion for twelve months, running time, at one hundred dollars per month. Guion transferred his rights to other parties who in turn assigned the lease

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to the plaintiff. On the fourteenth of November, 1865, the repairs being completed, Jacob Worley was made master of the boat. On the eighth of January, 1866, the T. D. Hine commenced a trip to Jefferson, Texas, and the plaintiff went on her in charge of the bar. Upon the return of the vessel and on the twenty-fifth of January, 1866, she was sold to Jacob Worley, and on the same day started on her second trip. When she had proceeded a short distance up the river the captain and owner, Worley, forcibly removed the plaintiff from the bar room and put him ashore.

The suit is brought against Mrs. Knorr, Worley, Shannon and Parmele, charging them with a conspiracy "to take said bar from petitioner and to expel him from said steamer," and damages are claimed composed of various items.

Worley pleaded to the jurisdiction of the court on the ground that his domicile was in the parish of Jefferson, and his exception was maintained. He is not before us. The case having been tried on the merits judgment was rendered in favor of the remaining defendants, and the plaintiff has appealed.

We do not think that the master of a vessel in the home port, the owner being present, has any authority in law to make a lease of the kind described, nor does the evidence establish a custom in this respect, so uniform, notorious and reasonable as in itself to validate this lease. But it seems that at the time the lease was made Parmele had not been removed by any overt act or declaration of the owner from his position as master, and would probably be deemed to continue to hold that character. 3 Sumner, 145.

He states that at the time the lease was executed he made Mr. Shannon and Mrs. Knorr aware of the lease and they made no objection to it; and again, he adds that he informed captain Worley that he had leased the bar and "had raised some money by it and used the same to have the boat repaired," by which he perhaps meant that he had in reality raised money in this way and thus used it. Though there is some conflict of testimony on the point, we are satisfied that the lease was ratified by the owner about the time of its date.

But it by no means follows that the defendants now before us are liable in damages for the tortious acts of Worley. We find no sufficient evidence of the conspiracy alleged by plaintiff. Parmele had nothing to do with it, nor had Mrs. Knorr. Indeed the brief for plaintiff seems to limit the alleged conspiracy to Worley and Shannon. But it will hardly be contended that Shannon conspired in his capacity of agent; and there is no reasonable certainty that he conspired on his own account, or even had any motive so to do.

It is urged by the plaintiff that the sale of the boat to Worley on the twenty-fifth of January, 1866, was a mere simulation in furtherance of the conspiracy, and that this is shown by Shannon's statement

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in his testimony that the boat was *leased* to Worley, but it appears that this leasing took place in November, 1865, and it was probably a charter party of some kind executed some time before the sale. In the absence of this conspiracy it is difficult to see how the plaintiff's claim can be maintained except against Worley. It is not necessary to characterize his conduct for he is not in court, but whatever may be his liability under the facts we cannot extend the warranty of Mrs. Knorr as lessor so as to cover the alleged violence of her vendee. She warranted against eviction, in the legal sense of that word, and not against assault, battery, or trespass of any kind on the part of Worley.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 1062.—A. DOLHONDE, Administrator v. Widow and Heirs of
WILLIAM LAURANS, deceased.

The items in the account of an agent are not prescribed by the lapse of three years from their date. Such claims are not embraced in the terms "open accounts" which by the statute of 1852 are prescribed against in three years; ten years is the only prescription against such a demand. 17 An. 246.

A PPEAL from the District Court, parish of Jefferson. *Cazabat, J. M. Blache*, for plaintiff and appellant, *Roselius & Philips*, for defendants and appellees.

HOWELL, J. This is an action by the legal representation of an agent against the widow and heirs of a principal, on an account current, running from August, 1859, to September, 1865, to which the defense is a general denial and the prescription of three years.

The plea of prescription was sustained as to a portion of the account and judgment given in favor of plaintiff, as administrator, against the widow and heirs of Wm. Laurans, deceased, for the balance, from which the plaintiff appealed.

The prescription invoked does not apply to any portion of the claim, as the agency continued until the death of Maxent in June, 1865, and this suit was instituted in March, 1866. See 17 A. 246.

The question really is one of evidence, the plaintiff contending that the vouchers and testimony fully support the whole claim, while the defendants invoke the statute of eighteenth of March, 1868, as excluding the application of acquiescence in the account rendered to the principal just prior to his death.

An account current running from August, 1859, to thirteenth of October, 1864, and showing a balance of \$3593 57 of the agent was, on this latter date, presented to the principal, Laurans, who was then too

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ill to attend to business, and who died on the fourth of the succeeding month and the presumption of acquiescence cannot under the circumstances arise. It is shown however, that Mrs. Laurans subsequent to the death of her husband, expressly acknowledged the correctness of the account rendered on the thirteenth of October, 1864, and she and the other two defendants permitted Maxent to continue as agent to collect the rents of the property of the succession as before. This may not bind the two heirs as to the correctness of the debit side of the agent's account. But the defendants obtained from the plaintiff, the administrator, the vouchers that were in his possession, and on the trial, upon an order of court, they produced "all the tax receipts, and policies of insurance delivered to them by the plaintiff and the account current of thirteenth October, 1864, furnished by Maxent," which with the account sued on, receipted bills for repairs to the property and extracts of receipt book signed by the deceased and the defendants, were received in evidence without objection. These documents with the oral testimony, under the circumstances, must be held to make out the case against the heirs as well as the widow in community.

The main questions presented in the briefs are the plea of prescription and the operation or application of the act of 1858, forbidding parol proof of the acknowledgment of a dead person to take a debt out of prescription, neither of which as we have seen is sustained on behalf of the defendants, as the prescription of three years does not apply to actions of this kind.

It is therefore ordered that the judgment appealed from be reversed, and that A. Dolhonde, administrator of L. F. Maxent, deceased, recover of Mary Helen Elizabeth Duplessis, widow of Wm. Laurans, deceased, and Pierre Evariste Laurans and Julia Emma Laurens his heirs, the sum of \$2936 93 with legal interest from judicial demand, in the proportion of one-half from the said widow, and the other half from the said two heirs jointly. The defendants to pay costs in both courts.

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No. 1957.—EUGENE STAES v. ARTHUR GASTINEL.

In ascertaining the meaning of a statute the rule is well settled, that it should be so construed, if possible, that no clause, sentence, or word, shall be superfluous or insignificant. 1 A. 162. The statute of 1856, page 117, § 1, amending the act of 1855, providing for the trial of contested elections in the parish of Orleans, gives to any one of, and to all the six District Courts then in existence, jurisdiction over all suits for the contest of the elections of all officers elected for and in the parish of Orleans, with the right of appeal to the Supreme Court as in other cases.

The office of Recorder of the Second District of the parish of Orleans is an office of the parish, and the election may be contested before the Sixth District Court of the parish of Orleans. Acts of 1856, page 117.

A PPEAL from the Sixth District Court of New Orleans. *Cooley, J. E. Fillenul*, for plaintiff and appellant, *E. Bermudez*, for defendant and appellee.

HOWELL, J. This is a contested election case, in which the plaintiff has appealed from a judgment sustaining exceptions to his petition. Both parties were candidates for the office of Recorder of the Second District of New Orleans at the election held on the seventeenth and eighteenth of April, 1868, and the plaintiff alleges that he was legally elected to said office and that the majority of votes apparently received by his opponent was the result of frauds committed to his prejudice, which he details at length in his original and supplemental petitions. Several grounds of exception were filed at different times and the one sustained by the judge *a quo* is in the following words, to-wit: "That there is no law giving the Sixth District Court any jurisdiction over a contested election of Recorder of the Second District of New Orleans."

The law which it is contended authorizes the suit reads as follows: "That the forty-first section of an act entitled 'an act relative to elections,' approved March 15, 1855, be amended and re-enacted so as to read as follows: that when any person shall desire to contest the election of any officer of, for or in the parish of Orleans, or of the First Judicial District composed of said parish, or any district in said parish, he shall, within ten days after the close of election, give written notice thereof to the appropriate party, which notice shall especially set forth all the grounds of contest, and shall, within the same space of time, present a petition to the judge of any one of the six District Courts of New Orleans. The judge shall proceed without delay to examine the grounds of contestation, and may, on the application of either party, order a jury to try the issue, from whose verdict an appeal may be had to the Supreme Court as in ordinary cases." Acts 1856, p. 117, § 1.

The original section forty-one of the act of 1855 (session acts, page 415), provided for contesting the election of only those officers in the parish of Orleans, to wit: the sheriff, coroner and clerk, confined the trial thereof to the First District Court of New Orleans, and made the decision in the lower court final. As amended it provides for contesting the election of *any officer of, for or in* the parish of Orleans, gave jurisdiction thereof to all the District Courts in New Orleans and confirmed the right of appeal. From the language of the section it was evidently the intention to enlarge the right and opportunity of contestation, and make it general in the parish of Orleans, embracing any and all officers elected by the people in said parish.

It is evident as a matter of fact that the defendant is an officer in the parish of Orleans. Those who voted for him were voters in the parish of Orleans and the district for which he was to be elected is geographically in the parish of Orleans. We know that a State tax collector is elected for precisely the same district and by the very same voters. In the nature of things there is no good reason why the law in question should refer to the one and not to the other. But besides this, there is a well settled rule of interpretation which must make

this amended section embrace the defendant, to wit: A statute should be so construed, if possible, that no clause, sentence or word shall be superfluous or insignificant. 1 A. 162; 2 N. S. 32; 4 N. S. 322; 1 R. 238.

The law maker had some object in using the word *in*, as well as the words *of* and *for*. If he intended only to include the officers of or for the parish, he would not have used the word *in* also. Such a construction would make the word *in* superfluous and unmeaning. Every officer of or for the parish is an officer in the parish, but every officer in the parish is not necessarily an officer of or for the parish as a distinct division of the State.

The other grounds of exception have no force. If the allegations of the petition are true, there is a cause of action. The election was held by virtue of the one hundred and fifty-fourth article of the Constitution, being a part of the ordinance by which the civil government of this State was established. The defendant having been a candidate at said election cannot be heard to question its legality. 13 A. 301.

The military commander did not assume to decide contests of elections, but referred the parties expressly to the courts.

It is therefore ordered that the judgment appealed from be reversed, that the exceptions of defendant be overruled, and the cause remanded to be proceeded in according to law; appellee to pay costs of appeal.

ON APPLICATION FOR REHEARING.

HOWELL, J. In refusing the application for a rehearing in this case, we deem it proper to say that from inadvertence the motion to dismiss the appeal submitted with the case on its merits, was not formally passed on, and we consider it totally unnecessary to open the judgment in order to dispose of it, as none of the grounds on which it is based have any foundation in law or fact.

As to the first and second grounds it is sufficient to say that the appeal was taken on motion, and the certificate of the clerk is in due form, and hence no citation nor assignment of errors is necessary; the exceptions on which the judgment appealed from was rendered present the questions on which the opinion of this court was sought.

The third and fourth grounds are not well taken for reasons assigned on the motion to dismiss in the case of *Fish v. Collens*, not yet reported.

As to the fifth ground, it is immaterial whether the reasons at length given by the judge for his decree are copied in one part or another of the record. They seem to have been the reasons for a judgment in another case, and the entry made in this case referred to them as the reasons for the judgment herein, and they are in the transcript.

Rehearing refused.

Pendery & Naylor v. The Crescent Mutual Insurance Company of New Orleans.

No. 1519.—PENDERY & NAYLOR v. THE CRESCENT MUTUAL INSURANCE COMPANY OF NEW ORLEANS.

A paper purporting to be a bill of lading, not signed by the captain or clerk of the boat, or any one authorized to sign the same, is not admissible in evidence in a suit for the recovery of damages from the insurance company where loss has occurred by the destruction of the steamer. In such a case the document was inadmissible until proved by competent testimony.

The evidence of the captain of the vessel as to the contents of a manifest, and the copy of the manifest are inadmissible until the loss of the original manifest is shown by evidence.

Testimony taken by commission in another State of the Union is inadmissible in the courts of this State unless the record of the testimony shows the authority of the commissioner who executed the commission.

APPEAL from the Fourth District Court of New Orleans. *Théard, J. W. W. Handlin*, for plaintiffs and appellees. *M. M. Cohen*, for defendants and appellants.

WYLY, J. This is a suit to recover the insurance on twenty bales of cotton which the plaintiffs claim were covered by the open policy of the consignee, Fred. Delbondio, with the defendants.

They aver that on twenty-sixth February, 1866, they shipped said cotton to said consignee on the steamboat *Mary Heinn*, which was destroyed with all its cargo and papers coming down Red river on or about twenty-eighth February, 1866; that they had made arrangements to consign their cotton to said Delbondio, who had an open policy with the Crescent Mutual Insurance Company, of New Orleans, to cover all the cotton consigned to them; that they sent with the boat a letter notifying the consignee of the shipment, which was destroyed with the boat, and afterwards they informed him thereof by telegram.

The defendants pleaded a general denial.

Judgment was rendered in favor of plaintiffs, and the defendants appealed.

There is no doubt that Fred. Delbondio, the consignee, had an open policy with the defendants, but the question is, was the cotton shipped as alleged, and was it covered by the policy?

This is a question of fact. The evidence to support it was objected to by the defendants—the court overruling the objections, received the evidence, and the defendants took four bills of exceptions.

The evidence, if admissible, establishes the fact and justifies the judgment; but if the bills of exceptions were well taken the proof does not sustain the judgment.

Plaintiffs offered a paper purporting to be a bill of lading without any proof of the signature or that it had been signed by the captain, clerk, or any one authorized to sign the same; the defendants objected, the objection was overruled, and the defendants took a bill of exceptions.

The instrument being an act under private signature, and not signed by the defendants, should not have been received without proof of the signature. The bill of exceptions was well taken.

The testimony of James Keniston, captain of the *Mary Heinn*, was objected to on the ground that his depositions purport to have

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been taken before a notary public of Hamilton county, Ohio, under a commission addressed to any judge or justice of the peace or Louisiana commissioner, and there was no proof of his official capacity, or that he was authorized to take the testimony under the commission. The bill of exceptions to this evidence was, in our opinion, also well taken. *Barelli v. Lytle, et al.* 4 A. 557; *McMicken v. Stuart*, 10 M. 571.

A bill of exceptions was also taken to the reception of the evidence of Captain Surls, offered to prove the contents of a manifest, and to the reception of the copy of manifest offered, on the ground that the testimony as to the contents and the copy of the manifest are not the best evidence, there being no proof of the loss of the original. We think the objection a good one, and the court erred in receiving this evidence.

The bill of exception to the deposition of James M. Davidson was also well taken, there being no proof of the authority of the notary or of the person pretending to be notary, in Ohio, to take the evidence. 5 N. S. 460; 10 M. 571; *Baine v. Willson*, 18 L. 59; 4 A. 557.

The evidence objected to was improperly received by the court, and without it, the plaintiffs have failed to make out their case.

It was a stipulated condition of the insurance that the assured should make monthly returns of all cotton insured. It appears from the return of the consignee, the said Delbondio, on sixth April, 1866, that the twenty bales for which insurance is now claimed, was not insured; no premium has been paid the defendants thereon.

The record does not, in our opinion, contain sufficient legal evidence to establish the facts necessary for plaintiffs' recovery.

It is therefore ordered that the judgment appealed from be avoided and annulled, and it is now ordered that there be judgment as of nonsuit and that plaintiffs pay costs of both courts.

Rehearing refused.

No. 1617.—MORRIS, TASKER & Co. v. JOHN G. FLEMING, Agent.

The allegation and testimony of a purchaser of goods of an overcharge by the vendor is not entitled to much weight when made for the first time after suit is brought, nor is the testimony of the purchaser admissible to show that other merchants would have made a larger discount than that allowed by the seller.

APPEAL from the Fourth District Court of New Orleans. *Théard, J. Breaux & Fenner*, for plaintiffs and appellees. *Randolph & Singleton*, for defendants and appellants.

HOWE, J. The defendant has appealed from a judgment rendered against him for goods sold and delivered.

The only question in the case seems to be whether the discount of thirty per cent. allowed by the bill of plaintiffs was sufficient. The goods were sold and delivered to defendant in February and April, 1866, and a witness for plaintiffs testifies that the goods were furnished

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at "as low a rate as they would have been furnished to any other buyer from that market at that time." The defendant does not appear to have raised any objection to the prices charged until suit was brought against him, many months after he had received the goods and the bills had been rendered to him.

Under such circumstances we do not think that his allegations of an overcharge and his own testimony that the discount should have been from thirty-five to forty per cent. are entitled to much weight. Nor did the Court err in excluding the testimony he offered, to prove that other merchants allowed a discount at the rate of thirty-five or forty per cent.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 1602.—H. MAILLARD v. MAX NIHOUL.

In a sale of goods in New York to a merchant in New Orleans by samples presented by an agent in New Orleans, to be delivered in New Orleans in quality equal to the samples presented, the sale is not complete until the goods are delivered, and they are at the risk of the seller until delivery takes place.

A PPEAL from the Fifth District Court of New Orleans. *Leaumont, J. Fellows & Mills*, for plaintiff and appellant, *John H. New*, for defendant and appellee.

HOWELL, J. Plaintiff alleges that at the city of New York, on twenty-seventh September, 1866, he sold a bill of goods amounting to \$721 82 to the defendant, at whose request they were shipped to New Orleans, and for which he asks judgment with seven per cent. interest.

The defendant answers denying that he purchased said goods, and avowing that in New Orleans samples were shown him by an agent of plaintiff, and he agreed to take the goods if they corresponded with said samples, it being no sale until he had the opportunity of examining and accepting the goods, which he never had, as they were never delivered in New Orleans. The testimony of plaintiff's agent is, that while in New Orleans, in July and August, 1866, he took an order from defendant on plaintiff for a general assortment of confectionery, to be shipped by steamer from New York and paid for in thirty days from date of the invoice; that the goods were shipped on twenty-eighth September, 1866, on the *Evening Star* and a bill of lading with the invoice forwarded by mail to the defendant; that at the time of taking the order he left a copy thereof with defendant, which contains all the conditions on which it was given; that the goods were sold from samples, but there was no agreement that they should correspond with the samples; it was a sale if they were equal to or better than the samples—and those shipped were superior. Nothing was said about insurance.

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Another witness states that he presented the bill sued on to defendant, who said "he had no money and could not pay just then."

A witness for defendant states that in September or October, 1866, he was present in defendant's store when plaintiff's agent exhibited some samples and defendant purchased the goods on the samples, stipulating that they should arrive in good order and be exactly similar to the samples. Nothing was said about insuring, but the goods were to be delivered at defendant's house according to the agent's authority.

The defendant testified that in September or October, 1866, the agent came into his store and asked him to come over and look at some samples. He went with the agent to the St. Charles Hotel where he chose from the samples shown the goods he wanted, which the agent promised to *deliver in New Orleans* exactly similar to the samples, defendant reserving the right to return them if they were not so. The goods were never received. No one else was present, and nothing was said about insurance. He ordered about seven hundred and twenty pounds of goods.

The evidence is somewhat conflicting, but it seems that the negotiation or agreement was made in New Orleans instead of New York, as alleged by plaintiff, that the goods were sold from samples shown defendant, were to be shipped from New York to him in New Orleans, a delay for payment was granted, and the goods were never delivered.

Under these conditions and the circumstances of the case the goods must be considered at the risk of the seller until the purchaser had an opportunity to ascertain if they were the goods he purchased, otherwise there is no object in purchasing by samples.

It is fairly inferred from the testimony of plaintiff's agent that the goods were sold on the suspensive condition implied by the exhibition of and sale by samples in New Orleans, when the goods were at the time in New York or perhaps not manufactured. He says it was a sale if the goods were equal to or better than the samples, but he does not say that the determination of this question was left by the defendant to his sole judgment.

The judge *a quo* did not err in giving judgment for the defendant. Judgment affirmed.

No. 891.—ABAT & CUSHMAN v. L. G. ATKINSON.

In a written contract of sale of a lot of one hundred bales of cotton between A and B the following stipulations appear:

First—A declares that he sells to B 100 bales of his cotton crop then on his plantation.

Second—The cotton was to be delivered at Randleson's Landing or at some other convenient point on the river. Suit is brought by B to enforce the performance of the contract, and a writ of sequestration issued, and a few bales of cotton on the plantation in the seed was sequestered by the sheriff; a *fi. fa.* was issued on a judgment in favor of the wife against A, and the same cotton was seized by the sheriff.

Held—That as B had no privilege on the cotton, and the sale not being completed by delivery, the weighing and counting of the bales being essential to perfect the sale, the seizing creditor must hold the cotton as against the sequestration.

A PPEAL from Fifth District Court parish East Feliciana. *Posey, J. Race, Foster & E. T. Merrick and Cross & Hardee*, for plaintiffs and appellants, *J. H. Muse*, for defendant appellee.

WYLY, J. In the year 1862 plaintiffs made a contract in writing with the defendant to purchase from him one hundred bales of his cotton crop then on his plantation averaging four hundred pounds per bale, more or less, the said cotton to be delivered at Randleson's Landing or some other convenient point on the river. In consideration of this contract the plaintiffs paid to the defendant thirty-four hundred dollars in cash.

This suit was instituted on sixteenth of August, 1865, to enforce the contract and recover possession of the cotton or its value. Petitioners allege that the defendant, Atkinson, has sold and appropriated a considerable amount of the cotton and acted in bad faith with them. They therefore prayed that a writ of sequestration issue, directed to the sheriff to seize and take into his possession "all the remaining cotton on the premises of said Atkinson or elsewhere, if to be found, or so much as will amount to said one hundred bales, and to hold the same subject to the order of the court," etc. On the same day the sheriff seized and sequestered five bales of cotton, more or less, in the seed on the premises of the defendant and appointed him keeper thereof.

Mrs. A. Boon, wife of the defendant, Atkinson, having a judgment against her husband for a large amount seized on all his personal property on the premises, including the lot of seed cotton sequestered by the plaintiffs; the sheriff having refused to sell the cotton under her execution she took a rule on him to show cause why the proceeds of the cotton levied on should not be applied, when sold, to the satisfaction, *pro tanto*, of her judgment.

In answer to the rule the sheriff showed that the cotton was sequestered by the plaintiffs, and being in his hands by legal process he could make no legal delivery thereof to a purchaser were he to sell it under the *fi. fa.* of the plaintiff in the rule.

On the trial the rule was consolidated and tried with this suit. The

court rendered judgment in favor of plaintiffs and against the defendant for the value of the cotton, and decreed that the privilege of the seizing creditor, Mrs. Adelia Boon, wife of the defendant, on the cotton seized by her, was superior to that of plaintiffs, and rejected plaintiffs' claim as to the cotton sequestered.

Plaintiffs have appealed.

The simple question presented in this case is, was the contract of sale declared upon consummated by the delivery of the cotton? If there was a delivery the contract of sale was perfected, and, of course, the cotton on the premises of Atkinson was not subjected to the seizure of his judgment creditors. The title to personal property, at least so far as it affects third parties, only passes by tradition.

The written contract must be examined to ascertain whether there was an actual delivery. From two expressions in the contract we are satisfied there was no delivery. One is where he, Atkinson, declares he sells one hundred bales of his cotton crop then on his plantation. He did not sell all his cotton crop on his plantation. He only sold part, one hundred bales of his cotton crop.

For aught that we know there may have been five hundred bales on the place. If one hundred bales had been destroyed by fire on whom would the loss have fallen? How could it be ascertained which of the bales belonged to the plaintiffs and which remained to the defendant?

We think in this case the sale was not completed, the bales not having been weighed and counted. The other expression in the contract which satisfies us there was no delivery is the stipulation that the cotton was to be delivered at Randleson's Landing, or at some other convenient point on the river. This was never done because the petition alleges that the defendant had sold and appropriated the cotton or a considerable part thereof. From the evidence we are satisfied there was no tradition or delivery of the cotton, and that it remained at the risk of the defendant, Atkinson, in his possession.

The question is not whether the plaintiffs have a privilege on the cotton in controversy superior to the seizing creditor's privilege; they have no privilege whatever; they have sequestered it as being the owners thereof. The sequestration gave no privilege; it merely detained the cotton till its ownership could be determined.

If there was no tradition or delivery there was no sale, but an obligation to sell which could not operate upon the property of the defendant so as to place it beyond the reach of the executions of his judgment creditors.

The testimony of the witness D. C. Hardee does not establish the sale of the six bales of cotton in the seed on the day it was sequestered, although he states there was a positive contract that "this six bales was to be credited on the writ." This does not establish a verbal sale independent of the written contract sued on, for the simple reason it

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lacked the essential elements of a contract of sale, there being no price, no delivery. It was a mere consent of the debtor that the proceeds of that part of his property when sold might be applied to the satisfaction of plaintiffs' claim. This consent could not defeat the right of his judgment creditor to execute her writ upon the property. We are satisfied the cotton in dispute was never delivered to the plaintiffs; it was not in condition to be delivered according to the evident intention of the parties at the time the contract was executed; that contract stipulated for the delivery to be made at a shipping point on the river, and we can not presume that the parties contemplated the delivery of seed cotton at a shipping point; they evidently intended it to be in merchantable bales ready for shipment; besides reference to the weights of the bales was mentioned in the contract.

It is therefore ordered that the judgment appealed from be affirmed with costs.

(Mr. Justice Howell was recused in this case.)

No. 1680.—H. A. BATTLES v. C. C. SIMMONS, MRS. BRACY, Garnishee.

The garnishment process can not be used as a substitute for a direct revocatory action, nor will the strict rules relative to the answers of garnishees be applied to answers to interrogatories whose only tendency is to assail titles to property.

A PPEAL from the District Court parish of East Feliciana. *Posey, J. Cross & Hardee*, for plaintiff and appellant, *F. Hardesty*, for appellee.

HOWELL, J. The plaintiff having on ninth February, 1867, obtained a judgment for \$944 13 with eight per cent. interest from December 1, 1861, against the defendant, C. C. Simmons, issued thereunder a garnishment process on twenty-third March following against Mrs. Mary C. Bracy to whom he propounded the following interrogatories:

Interrogatory 1. "Have you in your possession or under your control any property, rights or credits, notes or money, or property of any description belonging to the defendant, Charles C. Simmons, or are you indebted to him in any amount? If you answer yea, does the value of the property, rights, etc., as aforesaid, or the amount of your indebtedness equal the amount of the judgment of the plaintiff in this suit against Simmons?"

2. "Have you, since the close of the war bought any property of any description from the said Simmons? If you have, state if you have paid for the same, and if so, what amount and how you paid for the same, giving a minute and exact description of the said property and a statement of the value thereof.

3. "State your account with the defendant since the close of the late war, say May 1, 1865, up to the time of answering these interrogatories, with specific items of debit and credit, showing what you have

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received from the said defendant, under what kind of a contract you have received the same, how you have paid for the same, giving a thorough and definite account of your transactions with the said defendant.

4. "Have you not since the war bought a buggy and horse from the defendant? And if you answer yea, state what you paid and how you paid for the same. If you say no, state if you have ever had said horse and buggy in your possession or either of them, and under what title you have had them or either of them. Have you not got them or either of them in your possession, and if so, under what title?"

5. "Have you ever been made the depository of any money of the defendant, C. C. Simmons, obtained from his father's estate in West Feliciana or otherwise? If so, give a full account of the said deposit, and if you have paid over the same, state when and how, stating your account with items of debit and credit arising out of the said deposit."

These interrogatories, with the petition, were on the twenty-fifth March, 1867, served on Mrs. Bracy personally, who, without excepting to any of them, filed the following answers on the first April ensuing, to wit:

To interrogatory 1. "In answer to the first says no to all the inquiries embraced therein.

2. "To the second she says that she did, since the close of the war, buy some property of the said Simmons, but she paid him the cash for it, and owes him nothing. The amount of the property purchased and the value will be found of record in the recorder's office.

3. "To the third she says that she has had no account with the defendant more than already stated.

4. "To the fourth she says that since the war she bought a buggy from the defendant and paid him two hundred dollars. She had the said buggy in possession under the said purchase, the title by said purchase, has not said buggy in possession now, but is still hers.

5. "To the fifth she says she has never been the depository of any money of defendant from any party.

(Signed)

MARY C. BRACY."

The plaintiff then ruled the garnishee to show cause why judgment should not be rendered against her for the amount of his claim against the defendant for the reasons that her answers to the interrogatories are evasive, not categorical nor responsive to the questions therein contained, that she has wholly neglected to answer the second interrogatory and to give a full exhibit of her transactions with the defendant, that the answer to the fourth interrogatory is not responsive, that the answers to all the interrogatories show that there had been a series of transactions between the said parties within the time embraced in

said interrogatories, but that she has failed to state her account with the defendant called for by the third interrogatory; that the third, fourth and fifth interrogatories served to call forth definite facts in order to ascertain if the said garnishee was under real legal liability to the defendant, and that her failure to answer the same amounts to confession that she owes the defendant sufficient to satisfy plaintiff's judgment.

Several motions and amendments were made to the rulings on which bills of exceptions were reserved, but which under the view of the case which we have taken, it is unnecessary to notice.

This appeal is taken from the judgment dismissing the above rule of plaintiff.

Keeping in mind the legitimate object and function of the attachment and garnishment process it is not difficult to see that the answers of the garnishee in this case are responsive to all the pertinent and material questions propounded. The plaintiff in his petition alleged that the garnishee had property belonging or was indebted to the defendant, and under the act of 1839, articles 246 and 247 C. P., he was authorized to propound such questions as will show what property and the nature and value thereof belonging to the defendant the garnishee had, or what sum she was indebted at the date of the service of the interrogatories to the defendant. To all such questions she gave responsive categorical answers, denying that she owed the defendant anything or had in her possession or control any property belonging to him. To the other questions tending covertly to attack her titles to property or show fraud in any of her previous transactions with the defendant, she gave answers which can not properly be construed into a confession of having any property of the defendant or being indebted to him. On the contrary she asserted the reality of her purchases from and dealings with the defendant, and informed the plaintiff where the record of them existed. If her answers were untrue he could have traversed them. If her purchases were fraudulent he could attack in the regular mode. The garnishment process can not be used as a substitute for a direct revocatory action, (17 L. 555; 1 R. 435; 2 A. 99; 3 A. 651) and the strict rules prescribed by articles 362, 363 and 364 C. P. relative to the answers of garnishees, will not be applied to answers to interrogatories, whose only tendency is to assail titles to property. In this case the answers show that the garnishee is not indebted to the defendant and has no property belonging to him, and the plaintiff has not disproved them.

Judgment affirmed.

No. 2111.—ARMSTRONG and others v. THOMAS K. DAVIS.

Irregularities in the proceedings of the Probate Court ordering the execution of a will, and the relative nullities of the titles to property cannot be inquired into collaterally.

APPEAL from the Sixth District Court, parish of St. Helena. *Ellis, J. L. M. Pipkin* and *McVea & Hunter*, for plaintiffs and appellees, *Wilson & Bradley*, for defendant and appellant.

WYLY, J. In 1828, Moses Gordon bought two tracts of land adjoining each other in the parish of St. Helena from Samuel Lanier, and duly recorded his titles. One of the tracts containing three hundred and thirty-six and eighty-five-hundredths acres was acquired in the life time of his wife Mrs. Rutha Wells; the other was acquired after her death. At the time the sale to Gordon was made the said Samuel Lanier had five children issue of the marriage with his deceased wife.

Moses Gordon held possession of the land thus purchased, through his brother who remained over ten years in peaceable and undisturbed possession. Moses Gordon died and his brother continued in possession of the lands for his succession till 1839, when he also died. In a few years thereafter some of the heirs of Gordon's vendor, Samuel Lanier, took possession of the land, claiming a right thereto as heirs of their mother whose interest had not been sold, she having died before the sale. This right however only attached to the tract acquired in her life time.

In 1846 W. H. Kemp who married one of the heirs, purchased by notarial act, the claims of Pearson W. Lanier and Guion H. Lanier two other heirs of the said Samuel Lanier and his wife Mrs. Rutha Wells. They described the land in the act of sale as "being the same tracts of land sold by their father Samuel Lanier to Moses Gordon, senior, on the twenty-fifth of April, 1828, and therein fully described," etc. The consideration given these two heirs was two hundred dollars, they selling all their "interest and title to said lands, which they derived in and through their mother the said Rutha Wells, they only warranting the title against themselves and their heirs."

Such were the stipulations in the act of sale which was duly recorded. In 1848 W. H. Kemp and wife sold all their interest in said lands, by notarial act, to the defendant Thomas K. Davis, describing in the act the "lands as being the same which Samuel Lanier sold to Moses Gordon on the twenty-fifth of April, 1828." They only warranted the title so far as the same was vested in them by inheritance and by purchase from the other heirs Guion and P. W. Lanier; they expressly refused to "warrant the title against the heirs of Gordon or Armstrong."

On the twenty-second of October, 1866, the plaintiffs claiming to be the heirs and legal representatives of Moses Gordon and his wife Mary A. Gordon who had died in Wilkinson county, Mississippi, sued the defendant to recover the lands.

The answer denied generally the allegations of plaintiffs, denied that they are the heirs and legal representatives of Moses and Mary A. Gordon as alleged, averred that the land in controversy belonged to the defendant, and pleaded the prescription of ten, twenty and thirty years.

The case was tried by a jury and on the verdict the court rendered judgment in favor of plaintiffs for all the lands claimed except one-half of the tract of three hundred and thirty-six and eighty-five one-hundredths acres acquired by Samuel Lanier in the life time of his wife Rutha Wells.

The defendant has appealed.

The plaintiffs in their original petition claimed as heirs and legal representatives of Moses and Mary A. Gordon who died without issue in Mississippi; they afterwards amended their petition and claimed as testamentary heirs. The court permitted the amended petition to be filed and the defendant took a bill of exceptions. We can see no objection to the amended petition, the same being rather a specification of what kind of heirs they claimed to be, than an alteration of their pleadings, at least the amendment is not inconsistent with their original demand.

Plaintiffs are collateral relations of Mary A. Gordon and the testamentary heirs of Moses Gordon, both of whom dying in Wilkinson county, Mississippi, where their wills were duly probated.

On the first of May, 1867, the plaintiffs presented to the Probate Court of the parish of St. Helena, certified copies of the wills of Moses Gordon and Mary A. Gordon, and the probate thereof from the Probate Court of Wilkinson county, Mississippi, and the same was ordered to be registered and executed in said parish and State, in conformity with article 1682 of the Civil Code.

Plaintiffs offered as evidence of title the wills of Mary A. Gordon and Moses Gordon thus ordered to be executed in the Probate Court of St. Helena parish, and the same was received by the court, the defendant taking a bill of exceptions thereto on the ground that they had not been duly proved and ordered to be executed by a competent court, and because there was an interlineation of some words in the certificate from the Probate Court of Mississippi.

We think the bill of exceptions was not well taken; irregularities in the proceedings ordering the wills to be executed, and relative nullities in the title cannot be inquired into collaterally. 5 M. 661; 6 N. S. 361; 2 L. 70; 15 L. 537; 2 A. 451.

The wills establish the titles of plaintiffs to all the land owned by Moses Gordon in the parish of St. Helena. The evidence in the record fully sustains the verdict of the jury. The defendant's vendors only claimed to sell him the interest in the lands which they derived from their mother Rutha Wells, which was only her half of the community in the three hundred and thirty-six and eighty-five one-hundredths acres. The very deeds under which he holds describes the lands as

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the same sold by Samuel Lanier to Moses Gordon, and contains a clause that his vendors will not "warrant the title against the heirs of Gordon or Armstrong." The titles of Moses Gordon to the land in question have been recorded in the parish where it is situated since 1828, and he held peaceable possession thereof through his brother till 1839.

The defendant went into possession of the land only in 1848, and he has not held the same by a just title. The prescription therefore of ten and twenty years cannot avail him, and that of thirty years has not been acquired.

From a careful examination of the evidence, the plaintiffs have, in our opinion, made out their case beyond doubt.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 2121.—MRS. CAROLINE SIMMONS v. A. S. NORWOOD, Sheriff, &c.
and H. A. BATTLES.

On the trial of an injunction suit by the wife against the seizing creditor of her husband, a brother of the husband, a witness was asked by defendant on cross examination the following question: "What did your brother say to you in relation to the sale from him to Mrs. Bracy, (the donor) after it had been passed?" Held—that the answer was properly excluded, on the ground that the husband could not make a disclosure against the interest of his wife.

In a controversy about the title to real estate which is attacked on the ground of simulation, any title, on its face translati^{ve} of the property, is admissible as rebutting testimony against the charge.

APPEAL from the Fifth Judicial District Court, parish of East Feliciana. Posey, J. W. F. Kernan and T. B. Lyons, for plaintiff and appellee. Cross & Hardee and Race, Foster & E. T. Merrick, for defendants and appellants.

HOWE, J. The plaintiff claiming to be the owner of certain property by donation from her foster mother, enjoined its sale under a writ of *fieri facias* issued against the property of her husband by the defendant Battles. It appeared that the property in dispute was conveyed by the husband, Simmons, to the foster mother, Mrs. Bracy, and by the latter transferred by donation to the plaintiff in injunction.

The answer, after denying that the plaintiff had any legal judgment of separation from her husband, alleged that the plaintiff held title by a base simulation; that the sale by Simmons to Mrs. Bracy, and the donation by the latter were transparent disguises, intended by the parties to shield the property from execution, and prayed that the injunction might be dissolved, with damages.

The case was tried before a jury, and verdict given for plaintiff. From a judgment rendered on this verdict the defendants, after an unsuccessful motion for a new trial, have appealed.

Our attention is first called to three bills of exceptions reserved by defendants on the trial. The first shows that the defendants propounded to a witness for plaintiff, a brother of her husband, upon cross examination, the following question: "What did your brother say to you in relation to the sale from him to Mrs. Bracy, after it had been passed." The plaintiff objected on the ground that the husband could not make a disclosure against the interests of his wife, and the court sustained the objection. We are not prepared to say that this ruling was erroneous. As a general rule the declarations of a husband can no more be admitted in a case of this sort than could his own testimony. Greenleaf on Ev. § 341.

But it is contended by defendants that such declarations may be received as part of the *res gestae*. It is true that some declarations may be where they are really part of the *res gestae* and are not violative of marital confidence. The cases of *Averson v. Lord Kennard*, 6 East. 188; *Walton v. Greene*, 1 Carrington & Payne 621; *Gelchuel v. Bale*, 8 Watts (Pa.), 355, are familiar illustrations. But in all these cases it will be found that the declarations of the husband or wife whether admitted for or against the interest of the other, were *res gestae*. The same appears to have been the case in *Smalley v. Lawrence*, 9 Rob. 210. But we cannot go so far as to concede that the question objected to in this case was properly an inquiry in regard to *res gestae*. The witness is not shown to have been present *when* the sale was passed. What Mr. Simmons said *after* the sale, might have been said months and years after, and so, forming no part of those contemporaneous words which characterize and illustrate the principal act, might have misled the jury.

By the second bill of exceptions it appears that plaintiff offered an act of sale from Mrs. Bracy to C. C. Simmons, and parol testimony of Mrs. Bracy relating to such sale, to which the defendants objected on the ground that no such title had been asserted. The court thinking it would go to contradict the allegations of simulation made by defendants' answer, admitted the testimony. The defendants excepted on the ground that such evidence could only be received to rebut. We perceive no error in the ruling. Plaintiff was put on proof of the reality of the sale and donation. The testimony was relevant to the issue thus forced upon her, and we do not feel authorized to disturb a verdict merely upon a question as to the order of proof.

The last exception was reserved to a portion of the charge of the District Judge, in which at the request of plaintiff, he read to the jury the article 2455 of the Civil Code. The objection was that this article relates purely to delivery as between vendor and vendee, and has no application to what is required to complete a sale as to third persons. But the next document in the record shows that at the request of the defendant, the court charged the jury that if they believed from the

Mrs. Caroline Simmons v. A. S. Norwood, Sheriff, etc., and H. A. Battles.

evidence that the property described in the act of sale was not delivered, the sale was not completed, so far as third persons are concerned. It seems quite certain that the latter of these instructions must have neutralized any supposed injurious effect produced by the former.

Upon the merits of the case we are not prepared to disturb the verdict of the jury, it not being so evidently contrary to law and evidence as to demand such action on the part of this court.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 1509.—PAUL MARCELIN v. HIS CREDITORS.—Opposition of Widow G. SUTTERLIN.

In an opposition to the account filed by the syndic of an insolvent the record of a suit between the syndic and a third party is not admissible to prove that the opponent is not the owner of the notes on which the opposition is founded, nor is the brief of counsel for the insolvent, in other proceedings, admissible on the trial of the opposition of the account of the syndic.

The payment of interest on a promissory note up to a particular date, and an extension of the time of the payment of the principal to that date, will interrupt prescription.

The mortgage and vendor's privilege on real estate are not impaired by the sale of the property by a syndic of the insolvent, and the holder of the mortgage and privilege is entitled to first preference on the proceeds of the sale after paying the expenses of the sale.

A PPEAL from the Third District Court of New Orleans. *Fellows*, J. Alph. Canonge, for opponent and appellant. E. Filleul and C. E. Schmidt, for syndic and creditors, appellees.

LUDELING, C. J. It appears that Paul Marcelin and Joseph Albrecht purchased a certain lot with the improvements thereon from one May, and to secure the payment of the price they executed their joint obligations with a mortgage and vendor's privilege. Marcelin failed, and B. Saloy was appointed syndic of his estate.

The syndic caused the undivided interest of Marcelin in the lot of ground aforesaid to be sold, and he filed an account and tableau of distribution whereby he proposed to distribute the proceeds of the sale. The widow Sutterlin opposed the tableau. She alleges that she is the holder and owner of the two notes executed by Marcelin and Albrecht for the price of the before mentioned lot, and that her claim is entitled to be paid out of the proceeds of the sale of the property in preference to all other debts, except the expenses of the sale.

Her opposition was dismissed by the District Court, and she has appealed. The record contains several bills of exceptions, to which our attention has been directed.

First—The syndic offered in evidence the record of a suit between Saloy, syndic, and Albrecht, to prove by the allegations in Albrecht's answer that the notes did not belong to Mrs. Sutterlin. This was objected to on the ground that the record was *res inter alias acta*, she not having been a party to that suit.

The objection was overruled and the evidence was received. The judge erred. The objection should have been sustained. The allegations in the answer of Albrecht were not even sworn to, and if they had been, Mrs. Sutterlin never had an opportunity to cross examine Albrecht. She was a stranger to the proceedings.

Second—The brief of counsel of Marcelin was offered in evidence by the syndic and was objected to by the opponent on the same ground urged against the reception of the records above mentioned.

The court overruled the objection and received the evidence. That was wrong. There existed no privity between Albrecht and the opponent. It is difficult to conceive how the admissions of Albrecht or of his counsel could affect a third party.

Third—Albrecht's testimony was offered by the opponent and it was objected to by the syndic on the grounds that he was interested and that he was estopped from giving any testimony contrary to, or inconsistent with, a previous allegation or admission made by him in the suit of Saloy v. Albrecht. The court sustained the objection and excluded the evidence.

There is no proof in this record to show that Albrecht is pecuniarily interested in the suit. The second objection does not merit serious consideration. The evidence should have been received. It is unnecessary to examine the other bill of exceptions. The prescription of five years pleaded against the notes cannot be sustained.

On the fifth of March, 1862, the interest on one of the notes was paid up to the twenty-fifth of March, 1863, and on the other up to the fourth of March, 1863, and the terms of payment of the notes were extended to these dates. The opposition was filed on the twelfth of September, 1866.

The evidence convinces us that Mrs. Sutterlin is the legal holder and owner, by purchase, of the notes whereof she seeks to enforce the payment. They are secured by a mortgage and vendor's privilege on the property sold by the syndic. The mortgage and privilege were not impaired by the sale or transfer of the notes, after maturity, and they attached to the proceeds of the sale of the property mortgaged.

The rank of the opponent's privilege is superior to all other privileges on the proceeds in the hands of the syndic, except those granted in favor of the expenses necessary to effect the sale of the property. 11 An. 469; 18 An. 721. Succession of P. O. Lauve, 2 R. 381; 1 R. 446; C. C. art. 3234.

It is admitted in the record that Mrs. Sutterlin has received from the proceeds of the sale of the interest of Albrecht in the lot, four hundred and forty-eight dollars and ninety-eight cents more than was due by Albrecht. This reduced her claim to two thousand dollars, with eight per cent. per annum interest on one thousand dollars from the fourth of March, 1863, and on one thousand dollars from twenty-fifth March, 1863, subject to a credit of four hundred and forty-eight dollars and ninety-eight cents on the twenty-first day of January, 1867.

Paul Marcellin v. His Creditors. —Opposition of Widow G. Sutterlin.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of the opponent, Widow G. Sutterlin, against the syndic of Paul Marcellin for two thousand dollars, with eight per cent. per annum interest on one thousand dollars thereof from fourth March, 1863, and on one thousand dollars thereof from twenty-fifth day of March, 1863, subject to a credit of four hundred and forty-eight dollars and ninety-eight cents on the twenty-first day of January, 1867. It is further ordered that her mortgage and privilege be recognized as superior in rank and that her debt be paid in preference to the following claims set forth in the tableau, to wit:

For three certificates of mortgages on sundry pieces of real estate.....	\$ 43 00
Clerk's costs in suit of Saloy v. Albrecht.....	78 75
Sheriff's costs in same suit.....	42 20
J. Lamarre's charge for brief in same case.....	24 00
E. Filleul and C. E. Schmidt, attorney's fees, in suit of Saloy v. Albrecht.....	700 00
Attorney's fees in the insolvency since first account.....	300 00
B. Saloy's mortgage claim.....	885 00

It is further ordered that the tableau thus amended be homologated, and that the syndic pay the costs of both courts.

Rehearing refused.

No. 1637.—ELIZA W. LATHAM v. DANIEL HICKY.

Where a party demands the rescission of a sale, he must, as a condition precedent, return, or offer to return, the consideration which he has received.

Courts of justice will not extend relief to a party against his own contract without exacting strict justice from him to his adversary.

A PPEAL from the Fourth District Court of New Orleans. *Théard, J. P. H. Morgan*, for defendant and appellant. *Lacy & Marks*, for plaintiff and appellee.

LUDELING, C. J. The plaintiff sues to rescind the sale of her interest in the estates of her grandmother and grandfather, on account of the non-payment of the price. The defense is, that large sums have been paid to the plaintiff on account of the purchase, and that she has not returned, or offered to return the amounts received by her.

There was judgment rescinding the sale and reserving to plaintiff the right hereafter to claim from the defendant the difference, if any should exist, between the amount she may realize as heiress and the price of the sale. The defendant appealed.

The evidence shows that the plaintiff sold her right of inheritance, nominally, for \$18,000, but, in reality, for such sum as would represent the true value of the estates, when it would be finally settled. The estates are yet unsettled. The evidence makes it probable that the

21	425
46	490
21	425
52	1291

Eliza W. Latham v. Daniel Hicky.

present value of the plaintiff's share in the estates is less than the amounts she has already received from the defendant, and we would presume, in the absence of all evidence, that the sums given to her by the defendant, after the sale, were payments on the only debt due by him to her, and not loans. But the uncontradicted testimony of the defendant leaves no room for conjecture. He swears positively that the sums given to her, after the sale, were payments on account of the price of the purchase.

A party demanding the rescission of a contract must return, or offer to return the consideration received by him. It is a settled principle in courts of equity that relief will never be extended to a party against his own contract, without exacting from him strict justice to his adversary. This is a condition precedent to be heard. 3 N. S. 466; 4 La. 198; 19 La. 283; 2 R. 180; 5 R. 65; 6 R. 450.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that there be judgment dismissing the plaintiff's action as in case of non-suit. It is further ordered that the plaintiff and appellee pay the costs of both courts.

No. 2235.—L. P. HARANG, MICHAEL J. HAUCK, subrogated, v. JOHN T. PLATTSMIER et al.

A notarial act of mortgage has no effect against third parties until it is registered in the office of the Recorder of Mortgages for the parish where the property is situated. Acts of 1855, No. 274, sec. 1, page 335.

Where three separate mortgages have been executed on the same piece of property at different dates, and the last of the three is recorded first, and the property has been sold to pay them, the proceeds must be applied by preference to the payment of the mortgage first recorded. The fact that the last mortgagee had notice of the existence of the other two mortgages of prior date will not avail.

A PPEAL from the Seventh District Court of the parish of Orleans. *Collens, J. Braughn & Ogden*, for plaintiff and appellee, *Frank Haynes and T. A. Bartlette*, for appellants.

LUDELING, C. J. On the twenty-fourth of April, 1867, John T. Plattsmier executed before A. Mazureau, a notary public, an act of mortgage in favor of Charles G. Baquié for \$2250 and interest. The notes thus secured by mortgage were indorsed by M. J. Hauck for the accommodation of Plattsmier. On the third December, 1867, Plattsmier executed another mortgage on the same property in favor of Michael J. Hauck for \$1900. On the thirty-first day of December, 1867, still another mortgage was given on the property by Plattsmier in favor of Weaver to secure a debt due him for \$1717.

In this last act of mortgage the two first mortgages are referred to as existing on the property.

21	426
f125	163
f125	165
f125	169

L. P. Harang, Michael J. Hauck, subrogated, v. John T. Plattmier et al.

The property mortgaged has been sold, and the contest is over the proceeds thereof. The two first mortgages were not recorded until after Weaver's mortgage. It appears from the evidence that Weaver had knowledge of the existence of the two first mortgages. Under the circumstances, can he take advantage of the want of registry of the two first mortgages?

The acts of the General Assembly, No. 285, approved on the fifteenth March, 1855, declares "that acts, whether they are passed before a notary public or otherwise shall have *no effect* against third persons but from their registry." § 9. Another statute, No. 274, entitled "an act relative to registry," declares that "no notarial act concerning immovable property shall have any effect against third persons until the same shall have been recorded," etc. The second section directs how and where the acts shall be recorded, and it provides further "that all sales, *contracts* and judgments, which shall not be so recorded *shall be utterly null and void*, except between the parties thereto. The recording may be made at any time, *but shall only affect third persons from the time of the recording.*" Acts of 1855, page 315.

"This is the last expression of the legislative will upon the subject, and it is clear, precise, and contains no exception or qualification."

Whether the laws be good or bad is immaterial; courts are bound by them, and must determine the rights of litigants in accordance with their provisions. The lawgiver, it would seem, was determined to settle the vexed question, whether knowledge was equivalent to registry in Louisiana, and he declared that it was not. "All sales, contracts and judgments, which shall not be so recorded, shall be *utterly null and void*, except between the parties." It can not be pretended that Weaver was a party to the mortgages in favor of Baquié or Hauck. They were therefore null as to him, and could not affect his rights.

We concur in the views expressed by Mr. Chief Justice Merrick in the dissenting opinion in *Swan v. Moore*, 14 An. 638. See also 7 N. S. 662; 2 La. 125; 4 La. 241; 6 La. 541; 11 La. 342; 3 R. 160; 6 R. 314; 9 R. 14; 11 R. 56; 1 An. 249; 2 An. 598, 788; 6 An. 772; 4 An. 269.

The view we have taken of this case makes it unnecessary to notice the bill of exceptions.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that there be judgment recognizing the mortgage in favor of W. D. Weaver as first in rank, and entitled to be paid out of the proceeds of the sale of the mortgaged property in the hands of the sheriff by preference. It is further ordered that the plaintiff pay the costs of both courts.

No. 1480.—W. H. HIRE v. CITY OF NEW ORLEANS.

Officers of the city of New Orleans who received their appointments while the city and State were under the control of the military authorities were removable at pleasure. *Mandell v. The Mayor and City of New Orleans*, 21 An. page 9.

APPEAL from the Sixth District Court of New Orleans. *Duplantier, J. Fellowes & Mills and Alfred Shaw*, for plaintiff and appellee. *H. J. Leovy*, City Attorney, for appellant.

LUDELING, C. J. The plaintiff sues for \$10,125, with interest from fifteenth May, 1866, being for salary as coroner for the parish of Orleans, from the first of April, 1865, to the fifteenth of May, 1866, at the rate of \$9000 per annum.

The city pleaded a general denial, and averred that if the plaintiff was ever coroner he held his appointment under the military authority, and he was removable at pleasure. That he was duly removed on the first of May, 1865, and his successor qualified and entered upon the duties of his office shortly afterwards. The defendant further alleged that the salary of the office was reduced from \$9000 per annum to \$6000 on the third of April, 1865, and that the amount due plaintiff for salary from third April to the first of May was tendered to him, but he refused it.

The facts of this case bring it within the principles governing the cases of *D. E. Mandell v. The Mayor and City of New Orleans*, and *The State ex rel. Handlin v. The Auditor of the State of Louisiana*, recently decided.

It appears, from the evidence in this case, however, that for a portion of the time, when he was in office, the plaintiff has not been paid, that is, from third of April to the first of May, 1865, when he was removed.

It is proved that on the third April, 1865, the salary of the office was reduced to \$6000 per annum, hence the city owes the plaintiff five hundred dollars, the salary for one month. The prescription of one year pleaded in this case is inapplicable.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that there be judgment in favor of the plaintiff for five hundred dollars, with five per cent. per annum interest thereon from the first of May, 1865, till paid, and the costs incurred in the District Court, and that the plaintiff and appellee pay the costs of appeal.

Rehearing refused.

Peter Marcy v. Citizens' Mutual Insurance Company.

No. 1010.—PETER MARCY v. CITIZENS' MUTUAL INSURANCE COMPANY.

Where the order of appeal has been granted on petition the appellee must be cited, otherwise the appeal will be dismissed on motion.

APPEAL from the Sixth District Court, parish of Orleans. *Duplantier, J. Buchanan & Gilmore*, for plaintiff and appellee, *L. Gastera and A. & M. Voorhies*, for defendant and appellant.

WYLY, J. Appellee moves to dismiss this appeal because he has not been cited according to law, the appeal having been granted on petition and not on motion in open court, and also because the appellants have voluntarily executed the judgment by paying the same and by agreeing to discontinue the appeal after the same had been granted.

There is no evidence in the record that appellee has been cited and this court will notice at any time the want of proper parties to the appeal. 20 A. 37.

After the order of appeal was granted the parties thereto entered into the following agreement, viz: "The judgment having been satisfied in the sheriff's office, it is now agreed that the appeal be discontinued." This was signed by the attorneys of record for both parties.

Under the circumstances the motion to dismiss must prevail.

It is therefore ordered that this appeal be dismissed at appellant's costs.

Rehearing refused.

No. 1647.—JEANNET QUERTIER & Co. v. Succession of CHARLES HILLE et al.

21 429
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Where real estate has been specially mortgaged, or the vendor's privilege has been duly recorded to secure the payment of the price, and the purchaser dies and his succession is opened in the Probate Court, an order of seizure and sale may issue from a court of ordinary jurisdiction against the succession, to enforce the mortgage rights, and the property mortgaged be seized and sold, and the same tribunal that authorizes the sale has jurisdiction over the proceeds thereof, and those entitled to them may claim them in such court, where their rights must be established.

Under the homestead law the surviving widow and children of the deceased husband have a superior mortgage and privilege on the proceeds of the sale of the property of the husband to the extent of one thousand dollars over all other creditors, except the vendor's privilege and the expenses of the sale. She may assert this privilege in a suit between the other mortgage creditors and the purchaser of the property before the court that granted the order of seizure and sale.

APPEAL from the Second District Court of New Orleans. *Thomas, J. Hornor & Benedict*, for plaintiffs and appellants. *A. Canongo and Cyprian Dufour*, for appellees.

HOWELL, J. In January, 1862, real property belonging to the successions of Joseph Allen and Charles Allen, was sold under executory process in this suit for a debt due plaintiffs as first mortgagees, by the

partnership which had existed between the said Allen & Hille. After satisfying plaintiff's demand a balance of \$1852 88 of the proceeds remained. Francis Reynolds, as second mortgage creditor of said firm of Allen & Hille, and the administrator of Charles Hille, in January, 1864, took a rule on the purchaser, Louis Gerteis and Mrs. Marie Louise Allen, widow of Joseph Allen, and natural tutrix of the minor Allen, to show cause why said balance of \$1852 88, with eight per cent. interest, should not be paid to them, the movers in the rule. In this proceeding, in which a curator *ad hoc* was appointed to represent Mrs. Allen, a final judgment was rendered in this court in January, 1866, affirming the judgment condemning Gerteis, the purchaser, to pay Reynolds \$983 09, with interest at eight per cent. on one-half thereof from the twenty-ninth November, 1858, and on the other half from the twenty-ninth November, 1859, *up to the date of final payment*, and giving a non-suit as to the right of the representatives of the successions of the said two debtors to the balance of said purchase price. See 18 A. 65.

Reynolds issued execution on this judgment, and caused the property purchased by Gerteis to be seized, whereupon Gerteis, in May, 1866, enjoined the sale thereof, on the ground that since the rendition of the said judgment in favor of Reynolds, Mrs. Allen had instituted suit against him in the Sixth District Court of New Orleans for a sum of \$926 44, to be paid with first privilege out of the balance of \$1852 88 in his hands, and for the payment of which she claims a judgment against his said property. And, alleging that he can not be made liable beyond the price of his adjudication, he tenders in court the said balance due upon his property, and cites Francis Reynolds, widow Joseph Allen, J. P. Moore & Son, and Nicholson & Co., claiming privilege thereon, and asks the court to distribute the same among them according to their respective rights.

Reynolds answered that his judgment could only be satisfied by Gerteis on full payment without regard to any contesting claims, all of which he denied, as well as all the allegations of the petition, except his judgment and execution, and prayed for damages. Moore & Son pleaded the general issue, denying specially Mrs. Allen's claim to any of the fund deposited, alleging that Gerteis is responsible for interest thereon from the day of adjudication, and asking to be paid the residue after paying Reynolds. Mrs. Allen, as widow and tutrix, intervened as third opponent, claiming in her own name one-half of the fund deposited, by virtue of the privilege and mortgage securing her dotal rights, and in the event of her said claim being rejected she demands for herself and her minor child, who are in necessitous circumstances, the said sum under the homestead law. Default was taken as to Nicholson & Co.

By consent of parties, and without prejudice, Reynolds withdrew

one-half of said fund less fifty dollars, and the contest is in relation to the half alleged to be subject to the claim of the widow, or that of the widow and minor.

Judgment was rendered maintaining the injunction, discharging Gerteis from all liability to the defendants, canceling their privileges and mortgages resting on the said property purchased by him, and ordering the balance in the hands of the clerk, less the costs, to be paid to the curator of the widow, who was interdicted pending the proceedings, and the tutor minor; from which Reynolds appealed, and in this court Moore & Son join in the appeal.

On the trial below Reynolds moved to strike from the record the intervention and third opposition of Mrs. Allen, and to refuse to hear her herein, on the grounds:

“First, That she has no interest in this matter, which is a contest between Reynolds and Gerteis, into which no third party can be drawn.

“Second, That Mrs. Allen, if she has any cause of action, must assert it in the succession of her deceased husband, which is proved to have been opened, and cannot intervene here until her claim has been finally liquidated in her said husband's succession.

“Third, That said intervention and opposition comes too late, after all litigation between Reynolds and Gerteis has closed, and Reynolds has a final judgment in his favor, and stands with his execution in the premises of his debtor by the final decree of the tribunal of the last resort.

“Fourth, That the claim of the minor child of said Mrs. Allen is subject also to all of the foregoing objections.”

The motion was overruled, and a bill of exceptions reserved:

I. The interest which Mrs. Allen has in this matter is manifest. She had instituted suit against Gerteis, the purchaser, for a portion of the fund deposited by him in this proceeding, and upon which she claims a privilege and mortgage, and to which others make claim also. C. P. 300, 301, 401, 402, 403.

II. As the law permits succession property to be sold under an order of seizure and sale from a court of ordinary jurisdiction, it permits those entitled to the proceeds thereof to claim them in such court, where their rights thereto must be established, or a transfer thereof be made to a court specially vested with jurisdiction of the distribution of any residue. It may be, so far as this bill of exceptions is to be considered, that she has already liquidated her claim in the mortuary proceedings; but she is claiming a high privilege and mortgage on this particular fund, and must be heard.

III. The litigation between Reynolds and Gerteis, to which Mrs. Allen was not a party asserting the rights here involved and in the same capacity, cannot conclude her. Having his execution upon the property of Gerteis is evidence that the fund, upon which Mrs. Allen

asserts a privilege and mortgage, has not yet passed to his (Reynolds') possession, and that she has the opportunity to pursue it. The former proceeding, reported in 18 A., p. 65, did not determine finally the rights of the widow and minor. The question whether or not they were really parties to that proceeding was not raised; and it seems from the case as reported, and from the record thereof now before us, that Mrs. Allen, *as widow and natural tutrix*, was represented by a curator *ad hoc*, appointed on the motion of Reynolds himself. He then contended that Gerteis was bound to retain in his hands the residue of the purchase price for the benefit of the parties interested, and that his payment thereof to the sheriff was no payment in law, upon which the issue was made and decided; but no question was made as to the dotal rights of the wife or the homestead rights of the widow and child. They are not too late as long as they have not concluded themselves, and the fund subject to their rights may be reached by them, which is now the case.

IV. The foregoing applies to the claim of the minor. The District Judge did not err in entertaining the intervention and opposition of the widow and tutrix.

This brings us to the consideration of the claims to the balance still in the hands of the clerk of the court *a qua*.

The only property owned by the widow and minor, or either of them, at the date of the death of Allen or since, is the judgment of the wife against said Allen, her husband, recorded twenty-first January, 1860, in the parish of Orleans, and which proves to be valueless, as she intervened in the act of mortgage to Moore & Son, and renounced all her rights in their favor, and which renunciation inured to the benefit of Reynolds (10 R. 159, 12 A. 778), while they, the widow and minor, are shown to have been at the death of Allen, and to be yet in very necessitous circumstances. According to the terms of the homestead act, they have a preference over all other debts, except those for the vendor's privilege and expenses incurred in selling the property.

We think, under the circumstances, the District Judge made a proper disposition of said fund.

Judgment affirmed.

Rehearing refused.

No. 1646.—Succession of W. J. McARTHUR.

The functions of the attorney for absent heirs ceases when the heirs present themselves, and are recognized and put into possession of the succession by order of the court.

APPEAL from the Second District Court of New Orleans. *Thomas, J. M. C. Dunn*, attorney for absent heirs, appellant, *W. W. Handlin*, attorney in fact, appellee.

WYLY, J. On the tenth April, 1867, Robert J. Duffy was appointed

Succession of W. J. McArthur.

curator of the vacant succession of Wm. J. McArthur, and M. C. Dunn, Esq., was appointed attorney of absent heirs.

On the eighteenth of April the curator filed an account and tableau showing the assets and liabilities of the succession, praying that the same be homologated, and he be authorized to settle the succession in accordance therewith.

The attorney of absent heirs filed an opposition to this account, complaining of the excessive amounts allowed the creditors respectively, except the item of twenty-five dollars allowed him for fees as attorney of absent heirs, which he averred was not equal to the value of his services, the same being worth one hundred dollars.

In the mean time, to wit, on the twenty-seventh of April, 1867, Augustus E. McArthur, as sole surviving parent of the deceased, and as guardian of his minor children, was recognized by the court as sole surviving heir of the deceased, and ordered to be put in possession of the property of the succession.

The heirship was fully proved, the curator and the attorney of absent heirs cross examining the witness.

On the same day the said Augustus E. McArthur appointed William W. Handlin, Esq., attorney in fact, conferring upon him full power to collect, receipt for and settle with the curator of the estate of William J. McArthur, and specially authorizing him to dismiss all oppositions to the tableau, and to have the attorney of absent heirs dismissed, and to allow all the claims on the tableau to be paid. And the said McArthur on the same day appeared before Robert J. Ker, notary public, and made due and legal acknowledgment that he signed and executed the power of attorney for the purposes therein specified as his voluntary act.

On the twenty-seventh November, 1867, a full and complete settlement was made with said agent of Augustus E. McArthur, and a sum of money paid over to him. It was stipulated that all the claims on the tableau should be allowed, and the opposition of the attorney of absent heirs be dismissed. This covenant fully carried out the object of the order requiring the heirs to be put in possession.

Notwithstanding the settlement as aforesaid, the attorney of absent heirs continued his opposition, which was finally overruled by the court, and the account of the curator homologated.

The attorney of absent heirs has appealed from the judgment homologating the account, allowing fifty dollars fee to him, and also from the judgment recognizing the heirs, and ordering them to be put in possession of the property.

The creditors have been paid, and the property turned over to the heirs by order of the court.

We cannot see by what authority the attorney of absent heirs continued his opposition. After the heirs had appeared and appointed an attorney at law and attorney in fact to represent them, after they had been recognized as the heirs, and ordered to be put in possession of the property, the duties of the attorney of absent heirs terminated. He

had no one else to represent. Those for whom he was appointed to act had appeared, been recognized as the heirs by the court, and had made a settlement for themselves with the curator.

There are no allegations that there are other heirs in fraud of whose rights the settlement complained of has been made.

We think the court very properly overruled the opposition of the attorney of absent heirs, and homologated the account.

It is therefore ordered that the judgment be affirmed with costs.

No. 2154.—STATE OF LOUISIANA v. GEORGE A. FOSDICK.

The act of the Legislature of 1855, authorizing the imposition of a license tax of one thousand dollars on each insurer or insurance company not chartered by the State, and only imposes a license tax of five hundred dollars on each insurance company chartered by the laws of the State, is not in conflict with that provision of the constitution which requires that taxation shall be equal and uniform. 10 An. 402.

An agent of a foreign corporation domiciliated and doing business in this State, cannot invoke the inhibiting clauses of the Constitution of the United States against acts of the Legislature which it is alleged discriminate between citizens of this State and those of the other States of the Union.

APPEAL from the Seventh District Court, parish of Orleans. *Collens, J. H. C. Dibble*, for plaintiff and appellee. *Randolph, Singleton & Brown*, for defendant and appellant.

WYLY, J. The defendant has appealed from a judgment against him for the amount of his license as insurance agent for the year 1868.

He avers that the act of the 15th March, 1855, authorizing said license tax, is unconstitutional, unequal, unjust and oppressive. That it imposes a license tax of \$1000 on each insurance company or insurer not chartered by this State, and only \$500 on each insurance company incorporated by the laws of this State. He contends that this distinction is made between these two classes in violation of article 118 of the Constitution, and that as agent of the Queen's Insurance Company of Liverpool and London he is aggrieved by this unjust discrimination.

The constitutionality of this law was examined by this court in the cases of the State v. Ogden, and the State v. Lathrop, 10 A. 402, where it was held that the Constitution has not deprived the Legislature of the power of dividing the objects of taxation into classes; it merely requires that the burden be equal upon all those included in the same class. "That the class of insurance offices liable to the thousand dollar tax under the statute in question is entirely different from that which is liable to the five hundred dollar tax. If this State has thought fit to recognize foreign charters of incorporations to the extent of permitting foreign corporations to transact business in their corporate name, through agents within our limits, the Legislature had the undoubted right to attach what conditions it thought fit to the privilege."

It might have permitted the insurance companies incorporated under the laws of this State, and have excluded entirely the agents of foreign corporations, and all others.

It imposes an equal burden upon the agents of all the foreign insurance companies, and the defendant is not subjected to any greater license than others belonging to the same class.

It does not discriminate between the citizens of this State and those of other States, as the defendant alleges, giving the former greater privileges and immunities than the latter; but if it did, the defendant, as agent of an English corporation, cannot invoke the inhibitory clause of the Constitution of the United States in relation thereto. The citizens of all classes are permitted to pursue the occupation of insuring by incorporating themselves into companies for that business under the laws of this State, and by paying a license of \$500, or they can pursue the occupation by paying a license of \$1000 without incorporating under the laws of this State.

The statute presents two conditions, upon complying with either of which citizens or foreigners can pursue the insurance business in this State.

After carefully considering the printed argument filed by the defendant, we are unable to perceive any sufficient reason to depart from the decisions in the State v. Ogden and the State v. Lathrop, 10 A. 402, where, under the same state of facts as now presented, the statute in question was held to be constitutional.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 1639.—ST. FELIX CASANAVE, Administrator, v. ADAM L. BINGAMAN.

A white man is allowed, by the laws of Louisiana, to acknowledge his natural children by a woman of color. Such acknowledgment must, however, be made before a notary public in the presence of two witnesses. None but authentic evidence of the acknowledgment is admissible to establish the fact. C. C. 221, 222, 226; 12 R. 57.

APPEAL from the Second District Court of New Orleans. *Thomas, J. G. Schmidt*, for plaintiff and appellant. *W. H. Hunt*, for defendant and appellee.

TALIAFERRO, J. The plaintiff, as administrator of the succession of James Adam Williams, sues to get possession of the property of the estate which he alleges is illegally withheld from him by the defendant. The answer is that the defendant is the natural father of the decedent and his sole heir, and as such has been duly recognized and put in possession of the succession.

The facts appear to be that James Adam Williams, or, as otherwise named James Adam Bingaman, was one of three natural children who survived their mother, Mary Ellen Williams, a free woman of color who died in Adams county, Mississippi, in November 1861. She bequeathed a considerable amount of property to her heirs, then minors, viz: Charlotte Pauline (wife of the plaintiff in this case), James

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Adam and Elenora. In January, 1862, A. L. Bingaman, the defendant, was appointed their tutor. James Adam, the son, perished on board the *Fashion*, in the destruction of that steamer, on the twenty-seventh of December, 1866. He left no will and no heirs in the descending line. His succession was appraised to \$25,196 12.

The plaintiff, on the twelfth of July, 1867, applied for letters of administration, and after the usual proceedings were had, was duly appointed administrator of the estate.

On the ninth of July of the same year, three days before the filing of the plaintiff's petition, the defendant filed his petition in the same court, setting out his claim to the succession of his natural son, as his sole heir, and prayed to be decreed entitled to the same; that he be allowed to accept it with benefit of inventory, and that an inventory and appraisement be made. It was shown satisfactorily to the court that the defendant had by notarial act, on the thirteenth of July, 1865, formally acknowledged the decedent as his natural son; that the son died without descendants, and that there were no debts against his estate. Therefore, on the twelfth of July, 1867, an order was rendered recognizing the defendant as sole heir of the estate, and that he be put in possession as such.

In this suit the plaintiff alleges as grounds for annulling this order of the court, that the mother of the decedent died in 1861, and that the acknowledgment of paternity made by Adam L. Bingaman was "evidently made in the exclusive interest of himself, and was therefore inadmissible without additional proofs legally taken to prove the filiation. That A. L. Bingaman was not the natural father of the decedent, and that he expects to prove that he repeatedly denied being his father. That the decedent was a free man of color, the son of Mary Ellen Williams, a free woman of color, and the said A. L. Bingaman, being a free white man, labors under a twofold disability in the matter of the acknowledgment of paternity, because the laws of Louisiana forbid a white man from legitimating his colored children, and because A. L. Bingaman was incompetent to marry Mary E. Williams, the mother, at the time of the conception of the son, and hence could not acknowledge him as his natural child." The defendant excepted on two grounds; first, that the petition sets forth no cause of action; secondly, that the petitioner, Casanave, is without authority to stand in judgment herein as administrator of the succession of J. A. Williams, is identically the same person as J. A. Bingaman, and that the name of Bingaman was the patronymic by which that person was generally known, and to which he was entitled after the act of recognition in 1865. That the succession of J. A. Bingaman was not opened by the proceedings in virtue of which the plaintiff asserts the character of administrator of the estate of J. A. Williams, and could not be opened, because the same had been theretofore regularly opened and finally closed by the

judgment of the court rendered on the application of the defendant to be put in possession of said succession in the proceedings referred to in plaintiff's petition.

Judgment was rendered in favor of defendant, sustaining the exceptions and dismissing the plaintiff's action. The judgment further ordered that the under tutor of the minor, Elenora Williams, institute, either conjointly with the plaintiff and wife or in her own behalf separately, in the name of said minor, an action testing the validity of the order of the court decreeing A. L. Bingaman to be the sole heir of J. A. Bingaman, otherwise called J. A. Williams.

From this judgment the plaintiff has appealed.

The grounds upon which the plaintiff chiefly relies are : First, that the defendant was not the father of J. A. Williams ; second, defendant could not legally acknowledge him.

That James Adam Williams, as he was sometimes called, is the same person that was also called James Adam Bingaman there can be no doubt whatever. The identity is fully shown. The plaintiff's pleadings distinctly admit it. We do not see that lone declarations of defendant denying himself to be the father of the decedent, if such declarations had been proved, could have weight against his formal acknowledgment of paternity before a notary public and witnesses in manner required by law, and his sworn averments in judicial proceedings. That A. L. Bingaman was under any disability to make the acknowledgment of his natural child we do not see.

The question whether a white man can by the laws of Louisiana legally acknowledge his children by a woman of color underwent a very full examination in the case of Compton and others v. Prescott and another, executors, and others reported in 12 Robertson, page 57.

The court in that case said : " Our code, after having in article two hundred divided illegitimate children into two classes, to wit, those born from two persons who, at the moment when such children were conceived, might have legally contracted marriage with each other ; and those who are born from persons to whose marriage there existed some legal impediment, proceeds in the two subsequent articles to define who are meant by adulterous and incestuous bastards. Civil Code, articles 201 and 202. The latter can never be acknowledged (*ibidem*, article 222), and although there is a legal impediment to the marriage of a white person with a free person of color (article 95), the exception does not appear to extend to their illegitimate or natural children, for article 222 says only, " that such acknowledgment shall not be made in favor of the children produced by an incestuous or adulterous connexion." Now, article 221 says in positive terms, that the acknowledgment of an illegitimate child shall be made by a declaration before a notary public in presence of two witnesses, and provides that *no other acknowledgment shall be made in favor of children of color*. This last proviso contains a negative, pregnant with an affirmative, and un-

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doubtedly means, as we said in the case of *Robinett et al. v. Verdini's vendees* (14 La. 545), that any other proof of acknowledgment should be excluded when offered by children of color. It can not mean anything else, for article 226, by which illegitimate children who have not been legally acknowledged, are allowed to prove their paternal descent provided they be free and white; provided, also, that *free illegitimate children of color may also be allowed to prove their descent from a father of color only*; and it is obvious that the last restriction was inserted into the law, because with regard to his white father an illegitimate child of color is not allowed to prove that he has been acknowledged, but in the manner pointed out in article 221, to wit, by authentic evidence; and that, therefore, he can not resort to any other kind of proof but when his father is a man of color."

This is the settled jurisprudence of the State, and we are of the opinion that the defendant was not under any disability to acknowledge in the mode by public act before a notary and witnesses, the decedent as his natural son. We do not find that injustice has been done towards the two sisters of the deceased, J. A. Williams or J. A. Bingaman, for the judgment expressly reserves their right to institute proceedings to establish and recover any share or interest they may by law be entitled to in the succession of their brother.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, with costs in both courts.

Rehearing refused.

No. 2177.—CITY OF NEW ORLEANS v. O. E. HALL.

A party cannot make an appearance by rule to set aside a judgment by default on the ground that the proceeding against him was informal, and contrary to law; and at the same time urge the exception of want of citation.

Alleged errors in the assessment roll must be proved, and it must be shown that the party complaining has in vain endeavored to have them corrected in the manner prescribed by law.

APPEAL from the Fourth District Court, parish of Orleans *Théard, J. F. Michinard*, for plaintiff and appellee, *Clarke & Bayne and Renshaw*, for defendant and appellant.

HOWELL, J. This is a suit by special and summary proceeding for the collection of the taxes of 1867, in which a default was taken in the Fourth District Court for the parish of Orleans, on the sixteenth of January, 1869. On the thirtieth of the same month the defendant excepted "to the demand of plaintiff, on the ground that he has had no citation or notice as the law requires," and he prayed that the suit be dismissed. On the same day the following rule was filed: "On motion of Clarke & Bayne and Renshaw, attorneys for O. E. Hall, and on suggesting to the court that an exception has been filed herein by said Hall, it is ordered that plaintiff show cause on Monday the eighth of February, 1869, at ten o'clock, A. M., why the default herein taken

should not be set aside, the proceedings taken by the city of New Orleans herein, being informal and contrary to law."

This rule, after hearing evidence thereon, was discharged, and on the same day upon motion of counsel and filing an answer, the judgment by default was set aside. In the answer the defendant, "reserving his exception heretofore filed and averring that he ought not to be compelled to answer over for want of due citation and statement of plaintiff's demand, and by protestation, answers that said tax has not been lawfully assessed and is not due from this respondent."

Upon introducing in evidence the tax bill stamped, "published according to law, (signed) William S. Mount, Treasurer," judgment was rendered against the defendant, who appealed and who now contends that the law under which the plaintiff has proceeded (act of 1868, No. 197), does not authorize the city to proceed in this summary mode without citation in person or at the domicile, as the record does not show that a judgment for said taxes had been rendered against him, as contemplated by said act.

Admitting defendant's construction of said statute to be correct, and that it does not authorize judgments to be rendered against defaulting tax payers for the taxes of 1867, upon simple publication of notice in the official journal without specifying their names, except in cases where judgments have been rendered in 1868, in courts which may be without jurisdiction thereof under the Constitution of 1868, upon which point we express no opinion, yet he may, in strictness of pleading, be held to have waived any objection on this score, as there is no evidence in the record that his exception for want of due citation has ever been overruled, or that he has demanded a trial thereof before proceeding to the trial of any other issue. The rule to set aside the default, on the ground that the proceeding against him was informal and contrary to law, is not an exception based on a want of citation, and the suggestion therein that an exception had been filed is not a reservation of the exception. The rule asked that the default be set aside, while the exception asked that the suit be dismissed; and, although the evidence adduced on the trial of the rule may have sustained its allegations (a fact immaterial to the question of pleading), yet in making an appearance to file and try it, he waived his exception and practically admitted having notice of the suit. He cannot thus make an appearance and at the same time urge a want of citation. 4 L. 91; 5 L. 258; 10 R. 13; 1 A. 323; 11 A. 195, 197. The taking of the rule is an unusual proceeding.

As to any errors in the assessment they must be specially alleged and proved, and it must be shown that the defendant has in vain endeavored to have them corrected in the manner prescribed by the law. 11 A. 69, 195, 251; Acts 1856, p. 151 *et seq.* §§ 63, 65, 77, 78, 81, 82, 94, 95.

Judgment affirmed.

Succession of A. A. Duplantier, Deceased Wife of Thomas Peniston—Opposition to Tutorship's Account.

No. 1645.—Succession of A. A. DUPLANTIER, Deceased Wife of THOMAS PENISTON.—Opposition to Tutorship's Account.

APPEAL from the Second District Court of New Orleans. *Thomas, J. Roselius & Philips*, for opponent and appellant, *Cyprian Dufour*, for executor and appellee.

REPORTER.—This case was before the Supreme Court in May, 1867, and remanded to give the executor an opportunity of producing evidence to establish the correctness of the account which he had filed on behalf of the deceased tutor. On the second trial no other evidence was offered than that which was before the court on the first trial. The judgment of the District Court was the same as the first. The questions involved in the decision are set forth in the first opinion of the Supreme Court, reported in 19 Annual, page 277.

TALIAFERRO, J. The circumstances attending this case are peculiar and anomalous. A natural tutor who had under his administration for nearly eighteen years a large estate belonging to his minor child, died towards the close of the year 1862, without ever having presented an account of the tutorship. Shortly after the death of his father, the minor was emancipated and required from the executor of the estate of his father an account of the tutorship. An account was presented but owing to its informal character and the necessarily tedious examination of a mass of papers accompanying it, the court referred the account to auditors. Pending the investigation by the auditors and before they were prepared to report, the whole of the vouchers and papers of every kind relating to the tutor's administration were destroyed by the conflagration of the building in which they carried on their labors. The executor was called upon by an order of court to file another account. This he did stating the amount of the tutor's indebtedness the same as in the account at first rendered, to wit: \$64,135 31.

An opposition was filed on the part of the minor, and with it a detailed statement of the amount claimed to be due him for proceeds of property sold by the tutor, revenues received by him from rent of houses, lots, etc., in New Orleans and in the parish of Jefferson, interest on the money received, etc., the whole running up to one hundred and ninety-nine thousand nine hundred and fifty-nine dollars and thirty-one cents.

This demand is stated in the form of an account running from year to year, with the balances carried forward, bearing interest after allowing various credits and the commissions of the tutor on the revenues of the minor.

Upon the trial of the case the opposition was overruled, judgment in favor of the minor was rendered for the sum stated by the executor, viz: \$64,135 31. From this judgment the minor appealed, and the

Succession of A. A. Duplantier, Deceased Wife of Thomas Peniston—Opposition to Tutorship's Account.

appeal was before the Supreme Court in May, 1867. See 19 Annual, page 277.

The court at that time noting the very great discrepancy between the sum set down by the executor as due the minor and that claimed by the minor, and considering the loss of the papers which the tutor had preserved as vouchers to support his account of tutorship, and that the executor might by resorting to secondary evidence supply to some extent the evident deficiency of proof to establish the correctness of the tutorship account which he presented, reversed the judgment of the lower court and remanded the case.

No action whatever was taken by the executor to amend his proof; he filed the same account again and was met by the same opposition. The court below reiterated its judgment and apparently with stronger conviction of its correctness than when it passed upon it in the first instance. The opponent again appealed. We are left then to determine this controversy from the incomplete data before us.

We have gone over the ground under the best lights afforded. The claim of the minor in our judgment is sustained by preponderating evidence. We can by no means believe the account of the executor authenticated, and without proof to the contrary for the production of which ample opportunity was granted and none offered, we cannot believe that the liability of the succession of the tutor can be placed at the low figure at which the executor has fixed it. We are told that the amount was fixed by the tutor himself shortly before his death, and that his book of accounts relating to the administration of the minor's property, together with the numerous vouchers accompanying, were intrusted by him to a notary since dead, a gentleman of probity, to make out a regular and formal account. The counsel of the executor and the judge *a quo* find much weight in the fact that the father of the minor himself stated the amount of his indebtedness to his child, and that it should be presumed right.

We regret that the evidence in the record does not enable us to concur with these views, so creditable to their charity. We find from the record that the tutor sold property of the minor to an amount exceeding one hundred and twelve thousand dollars, every dollar of which we have no doubt he received.

On the twenty-fifth of April, 1857, real estate in Jefferson was sold for \$25,140; on the tenth of May, 1858, slaves were sold to the amount of \$3935; and in the month of February, 1860, a further sale of real estate in Jefferson was made to the amount of \$83,820. The inventories show in the minor ownership of various houses and lots in New Orleans and lots of ground in Jefferson. Voisin, a witness testifies that he was for six or seven years the agent of the tutor in the collection of rents. He says that the rents of houses and lots and of vacant lots for gardens, etc., amounted to from \$600 to \$800 per month, adding to this the interest on money in the hands of the tutor.

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proceeds of the sales of property, the minor must have had a revenue of over ten thousand dollars per annum after 1857; and this must have increased after the large sale of his Jefferson property in 1860. From some accounts and memoranda of Voisin, in evidence, the cost of erecting buildings on lots of the minor on Apollo and Terpsichore streets in 1860, was \$12,000. This, with repairs of buildings from 1858 to the end of 1862, makes the sum of \$15,039 87. The rents, the witness states, immediately increased on the new buildings put up on Apollo and Terpsichore streets. The hire of the minor's slaves before they were sold also helped to swell his large revenue.

From aught that appears in the evidence we must conclude that the income of the minor exceeded quite largely all the costs of repairs of buildings, the various other expenses of the property, and his own support, clothing and education.

As we have already said, the evidence preponderates in favor of the minor's claim. We think that judgment must be rendered in his favor.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled and reversed, and that the opponent Joseph Allard Peniston have and recover from the succession of his late father Thomas Peniston, the sum of one hundred and ninety-nine thousand nine hundred and fifty-nine dollars and thirty-one cents with interest thereon at five per cent. per annum from the first day of February, A. D. 1864, with legal mortgage, to be paid by preference. The costs to be borne by the succession.

NO. 2243.—STATE OF LOUISIANA v. GEORGE MUSTON.

The bill of indictment for the crime of embezzlement must designate the thing embezzled. Charging the accused with the embezzlement of the sum of eleven dollars is insufficient to hold the prisoner.

A PPEAL from the First District Court of New Orleans. *Abell, J.* *S. Belden*, Attorney General, for the State; *E. Fillcul*, for defendant and appellant.

LUDELING, C. J. This record shows that George Muston was convicted of embezzlement, that he was sentenced to eighteen months' imprisonment at hard labor, and to pay the cost of the prosecution.

Our attention has been directed to several alleged errors apparent upon the face of the record. It will be necessary to notice only one of them.

The indictment recites "that the prisoner did receive and take into his possession for and on account of the said O. E. Hall the sum of eleven dollars so received as aforesaid, the said George Muston then and there fraudulently and feloniously did wrongfully use, conceal, dispose and otherwise embezzle contrary to the form of the statute."

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The defect is, *the thing embezzled is not indicated*. The statute declares "that in prosecutions for embezzlement or larceny of bank notes, checks, bills of exchange, promissory notes, gold or silver money, or of any other property of that kind, it shall not be necessary to set forth in the indictment a *minute and detailed* description thereof, but a general allegation of the amount, *and the thing embezzled* or stolen shall be sufficient." It is necessary to designate the thing embezzled. What is the prisoner charged in the indictment with embezzling? The sum of eleven dollars. But the indictment does not inform us in what "the sum of eleven dollars" consisted; it is not alleged that the sum embezzled consisted in gold or silver dollars or in currency—whether in two or more coins or treasury notes or bank bills. The defect is one of substance and not of form, and the omission vitiates the indictment. Acts of 1855, § 82; 10 An. 230; 20 An. 49.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, that the verdict of the jury be set aside, and that the case be remanded to be proceeded in according to law.

No. 2292.—THE STATE, etc., ex. rel. C. ROMAN, President, etc., v. THE JUDGE OF THE SIXTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

An appeal bond is lawful and operative when signed by two or more sureties who bind themselves each for a stated sum or portion of the bond, the aggregate amount of the respective sums being the full amount required by law.

APPPLICATION for a writ of prohibition. *A. & M. Voorhies*, for relators.

REPORTER.—The question of the validity of an appeal bond, where the sureties thereon limit their liability to a certain amount was first determined in the case of *Bastable's Heirs v. Succession of Denegre* in the month of June, 1863, by the Supreme Court organized under the Constitution of 1864. The question arose in that case on a motion to dismiss the appeal on the ground that the bond was invalid, the sureties having divided their liability. In that case it was held that the sureties could limit their liability. That case which is still pending in the Supreme Court forms a precedent for the decision in this case, Mr. Chief Justice Ludeling and Mr. Justice Taliaferro dissenting from the majority of the Court.

HOWE, J. The question to be decided in this case is whether a bond furnished for a suspensive appeal is lawful and operative when executed by two or more sureties who bind themselves each for a stated sum or portion of the bond. The aggregate amount of the respective sums being the full amount required by law.

This question was discussed and determined in the affirmative in the case of *Bastable's Heirs v. Succession of Denegre*, decided on motion to dismiss in June, 1863, but which has not yet been reported for the reason that the cause has not yet been tried on the merits. We adhere to the opinion expressed in that case, and are therefore constrained to decide that the writ demanded herein must issue.

The State, etc., ex rel. C. Roman, President, etc., v. The Judge of the Sixth District Court for the Parish of Orleans.

It is therefore ordered that a writ of prohibition be issued as prayed for, directing the respondent to proceed no further in the case of *M. Marinoni v. The Pelican Mutual Insurance Company of New Orleans*.

LUDELING, *Chief Justice, dissenting*:

In this case I concur in the decree, although I dissent entirely from the views expressed by the court. The relator avers that in the suit entitled *M. Marinoni v. The Pelican Mutual Insurance Company of New Orleans* a judgment was rendered against the company for \$7500 with five per cent. per annum interest from twenty-second day of March, 1868; that within the legal delays he applied for and obtained an order for a suspensive appeal, and he executed an appeal bond for the amount required by law in favor of the clerk of said court. He avers further that a motion was made by the plaintiff in said suit to quash the suspensive appeal on the ground that the bond furnished was not such as the law required; that each of the sureties on the bond had limited his responsibility to a part only of the bond, instead of binding himself for the whole amount of the bond, and that the suspensive appeal was dismissed.

They aver that unless restrained by the mandate of this court the District Judge will continue to entertain usurped jurisdiction of the case and will permit the execution of the judgment notwithstanding the suspensive appeal. They pray for writs of prohibition and mandamus against the judge, sheriff and clerk.

The District Judge has acknowledged service of the petition for the writs of prohibition and mandamus and waived service of the rule nisi; and he has furnished in writing the reasons for his decision.

He says: "The point to be decided is whether an appellant can furnish bond for a suspensive appeal with two or more sureties, who obligate themselves, each for a stated sum or portion of the bond?" And I think he answers the question correctly in the negative. The law requires the surety to be bound *in solido*; if there be more than one surety on the bond *each one* must be bound for the whole amount in favor of the payee. This is what article 2036 of the Civil Code declares is to be bound *in solido*. Toul. vol. 6, No. 723; Path. on Obligations, No. 261. Article 575 of the Code of Practice requires the appellant to give "a good and solvent surety, residing within the jurisdiction * * * as surety for the payment of the amount of the judgment."

The judicial surety is bound absolutely for the debt. C. C. article 3014, 3035.

Whether the sureties may limit their liabilities by agreement among themselves is not a question for decision in this case. I think they can not bind themselves in a manner different from that in which the law says they shall be bound toward the payee of the bond. The appeal "bond is taken with reference to the law and must be construed by it." C. C. 3035; 3037; 2 La. 399; 9 R. 538; 4 An. 373; 7 An. 539, 570;

The State, etc., ex rel. C. Roman, President, etc., v. The Judge of the Sixth District Court for the Parish of Orleans.

12 An. 69; 13 An. 604. The principal in the bond is bound in the sum of eleven thousand five hundred dollars, and the conditions in the bond are as follows: "Whereas, the above bounden Charles Roman, President of the Pelican Mutual Insurance Company of New Orleans, this day filed a petition of appeal from a final judgment rendered against said insurance company in the suit of M. Marinoni v. The Pelican Mutual Insurance Company of New Orleans in the Sixth District Court for the parish of Orleans on the — day of —."

Now the condition of the above obligation is such, that the above bound Charles Roman, President of the Pelican Mutual Insurance Company, shall prosecute his appeal and shall satisfy *whatever* judgment may be rendered against him as President, or that the same shall be satisfied by the proceeds of the sale of estate, real or personal, if he be cast in the appeal, *otherwise that the said surety shall be liable in his place*. And then follows the signatures of the parties to the bond with different amounts, in figures, after the signatures of the sureties. In the case of *Slocomb et al. v. Robert* this court said: "It has been urged that we have often said 'in whatever manner a man binds himself he shall remain bound.'" This may be true in mere conventional obligations, but not in judicial bonds taken by a sheriff from persons in his custody. In such a case the sheriff has no power to take any other bond but that which he is authorized by law to take. *Any clause which is superadded must be rejected*, and any that is omitted supplied." They offered themselves as sureties *on an appeal bond*, and their responsibility is fixed by the law. My opinion is that sureties on an appeal bond can not limit their liability to the appellee, and that they are bound *in solido*, as the law contemplated they should be, each for the whole debt, notwithstanding any attempt on their part to limit their responsibility. I think therefore that the bond is valid.

Taliaferro, J., dissenting:

When a party agrees to sign an appeal bond as surety he consents to bind himself as the law requires him to be bound, and he ought not to be heard to gainsay his obligation. The purpose of the law in requiring the parties to be bound solidarily is to secure the speedy and practicable execution of the judgment appealed from in the event of its confirmation on appeal. This purpose would be prostrated if the appellant were allowed to give a bond signed by sureties bound each for a portion only of the amount of the bond. If this doctrine was admitted, an appellant might give an indefinite number of sureties each bound for a minute part of the amount, and thus practically render the judgment against him nugatory after its confirmation by the appellate court.

I concur with the Chief Justice in dissenting from the opinion of the majority of the court.

No. 1548.—F. M. FISK v. R. M. MONTGOMERY.

An application for a new surrender of an insolvent is a new suit and not a continuation of the first proceedings against the insolvent, and if not brought until after the passage of the bankrupt laws by the United States, cannot be entertained by the State courts.

The passage of the general bankrupt laws by the United States superseded all State insolvent laws. 19 An. 497.

APPEAL from the Fifth District Court of New Orleans. *Leaumont, J. T. A. Bartlette*, for plaintiff and appellant. *G. L. Bright*, for defendant and appellee.

HOWELL, J. This suit was brought in June, 1866, to compel the defendant "to make a new surrender of his property for the benefit of his creditors according to law;" was put at issue, and when called for trial on sixth November, 1867, the defendant pleaded the peremptory exception that Congress having adopted a general bankrupt law, the insolvent laws of this State are thereby superseded and no State law now exists to sustain the action. This exception was maintained and the plaintiff has appealed. He contends that the jurisdiction of the Fifth District Court over the subject matter had fully vested, and was not divested by the subsequent passage of the bankrupt law, and he cites, in support of this position, the cases of *West v. His Creditors*, 5 R. 261; 8 R. 123; *Dwight v. Simon*, 4 A. 493; *Makins v. Their Creditors*, 19 A. 497.

These cases go no further than to maintain the jurisdiction of the State courts where the surrender had actually been made and the insolvent proceedings were pending when Congress passed the bankrupt laws. Here the proceeding is to force a new surrender and before the surrender is ordered, the law under which it can be made and conducted is superseded or suspended (15 A. 602), and consequently the judge *a quo* did not err in dismissing the action to force the surrender which is authorized by the Code, admitting that any of the articles of the Code on the subject of the cession of property are now in force.

This suit cannot correctly be considered a continuation of the suit of *R. M. Montgomery v. His Creditors*, but is a new suit based on a course of action alleged to have arisen since the surrender was made, and is in express terms for a new surrender.

Judgment affirmed.

Mayor and Council of the City of Carrollton et als. v. Board of Metropolitan Police et als.

No. 1954—MAYOR AND COUNCIL OF THE CITY OF CARROLLTON et
als. v. BOARD OF METROPOLITAN POLICE et als.

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The act of the Legislature of March 17, 1859, incorporating the city of Carrollton authorizes suit to be brought by the Mayor and councilmen for and on behalf of the city.

The affidavit of the Mayor that the interest of the city is above five hundred dollars is sufficient to give the Supreme Court jurisdiction of the appeal.

Under the charter the city of Carrollton is dispensed from giving bond in case of appeal. Act approved seventeenth of March, 1859.

The act of the Legislature of September 14, 1868, creating a metropolitan police district repealed so much of the charter of the city of Carrollton approved March 17, 1859, as gave to the Mayor of said city the control and administration of the police.

The act of the Legislature of September 14, 1868, took away all control over the police of the city of Carrollton from the Mayor and vested the same in the Board of Metropolitan Police, and the Mayor and council in their representative capacity having no right in themselves to administer the police, they cannot question the constitutionality of the act of the Legislature vesting the power of policing the city in the Board of Metropolitan Police.

A party wishing to have the constitutionality of an act of the Legislature tested before the courts must disclose an interest in his individual or representative capacity that is affected by the statute of which he complains.

That part of the act of the Legislature of September 14, 1868, creating a metropolitan police district and providing for the government thereof, which divests the Mayor and Council of the city of Carrollton from all control over the police of said city and vests the same in the Board of Metropolitan Police created by the act, is constitutional and valid.

A PPEAL from the Second District Court, parish of Jefferson. *Par-*
dce, J. B. C. Elliot and N. Commandeur, for plaintiffs and appel-
lants. *J. Hawkins*, for defendants and appellees, *E. Fillet* on the
same side.

WYLY, J. Appellees move to dismiss this appeal on the following grounds, viz:

First—Because the city of Carrollton is not a party to this suit. The plaintiffs being “one Mayor, six councilmen and five policemen of the city of Carrollton,” who sue in their official capacity.

Second—Because the plaintiffs and appellants have given no appeal bond.

Third—Because the record does not show that the interest of each and all the appellants in the matter in dispute exceeds five hundred dollars.

The section of the act approved seventeenth March, 1859, entitled “an act to incorporate the city of Carrollton,” provides: “That the affairs of said city of Carrollton shall be administered by a Mayor and eight councilmen, and *in and by the name of Mayor and Council of the city of Carrollton*. The said corporation shall be and is hereby made capable in law, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended in any court or courts of record or justice or other place whatever; but in all judicial proceedings where, by existing laws, bond and security is required from litigants, the city of Carrollton shall be dispensed from furnishing bond or security.” * * Act of 1859, 219, No. 277.

Mayor and Council of the City of Carrollton et al. v. Board of Metropolitan Police et al.

This suit is filed by the Mayor and six councilmen of the city of Carrollton in their official capacity. We consider the city of Carrollton the real party plaintiff in this suit. The act incorporating the city of Carrollton, a part of which we have just quoted, expressly declares that the city may sue and be sued in the *name of the Mayor and Council of the city of Carrollton*.

The majority of the councilmen have the right to sue in the name of the board. 3. M. 495.

The city of Carrollton is dispensed from giving bond.

The Mayor has filed his affidavit in this court stating that the interest of the city of Carrollton in the matter in dispute exceeds five hundred dollars. This is sufficient to give this court jurisdiction.

It is therefore ordered that the motion to dismiss be overruled.

ON THE MERITS.

The city of Carrollton has enjoined the Board of Metropolitan Police from discharging police duty within the limits of their corporation, alleging that said board without the color of right, justice or law has assumed the administration of the police of that city, preventing by threats and violence the policemen appointed by them from acting in their capacity. They also allege that the act organizing the metropolitan police district and providing for the government thereof is unconstitutional in various respects.

The defendant moved to dissolve the injunction on the following grounds :

First—That the injunction issued without any warrant or authority of law.

Second—That the corporation of Carrollton withdrew their police force then on duty under its charter, and allowed the force organized under the metropolitan police law to take charge of and police said city.

That—That the metropolitan police act authorized the defendant to control the police of Carrollton, and it repealed that part of its charter inconsistent therewith.

The court sustained the motion and dissolved the injunction.

Plaintiffs have appealed.

The right to administer their police was conferred on the plaintiffs by an act to incorporate the city of Carrollton approved seventeenth of March, 1859, the eighth section thereof providing: "that in addition to other duties therein laid down the Mayor of said city shall superintend the police thereof," etc.

The corporation only derived its authority from the Legislature; it is the creature thereof and has no powers over the police except such

Mayor and Council of the City of Carrollton et al. v. Board of Metropolitan Police et al.

as the law confers. The act of fourteenth September, 1868, establishing a metropolitan district and providing for the government thereof, embraces the city of Carrollton within the police district and confers on the defendant full powers to administer the police throughout the district; it also repeals all laws in conflict with the provisions thereof, and took effect from and after its passage.

Then what right have plaintiffs to claim the jurisdiction or the control of the police of Carrollton? All their powers over the subject matter have been withdrawn by the same authority which conferred them and which gave life to the corporation itself.

Having no powers themselves to supervise the police of their city what interest have they in testing the constitutionality of the provisions of the act which do not concern themselves.

They say the act complained of confers judicial powers on the Metropolitan Police Board in violation of seventy-third article of the constitution; that it violates the ninth article which protects the rights of the people to be secure in their property; that it inflicts strange and unusual penalties; that it confers power on said board to tax the people of Carrollton; that it provides for the holding of an office and the paying of a salary to a person who already holds the office of Lieutenant Governor, in violation of articles forty-one and one hundred and seventeen of the Constitution; that it violates article one hundred and fifteen by referring to various acts; that many of its provisions are contrary to and inconsistent with its title, in contravention of article one hundred and fourteen of the constitution, and that it violates the constitution of the United States.

Assuming that some of its provisions do conflict with the constitution, does the act violate any of the constitutional rights of the plaintiffs? Does it impose a tax upon the corporation, infringe upon their rights of property or authorize the exercise of judicial powers by said board toward them?

If the act subjects the people of Carrollton to unjust taxation and the strange and unusual punishment complained of, they have a remedy through the courts by which to avert the infringement of their constitutional rights.

In all these matters the corporation of Carrollton, in the opinion of the Court, is without interest; it is not affected by any of the provisions of the act, which they say violate the articles of the constitution of this State and of the United States.

The court cannot entertain abstract questions of law, presented by parties without interest and wholly unaffected by the illegalities and unconstitutionality complained of. Whether the title of the act is sufficiently comprehensive to embrace all its provisions is immaterial; it is certainly broad enough to cover the provision making Carrollton a part of the police district, and also the provisions withdrawing

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police powers from the corporation of Carrollton and conferring the same on the defendants, the Board of Metropolitan Police. The provisions, at least, of the act divesting the plaintiffs and investing the defendant with police powers, are not violative of article one hundred and fourteen of the constitution; and that is the only interest plaintiffs can have in raising a constitutional objection.

In *Diamond v. Cain*, lately decided, where the same constitutional questions were presented, this court held that Diamond was without interest to enjoin the Superintendent of the Metropolitan Police from the discharge of the functions of his office, and that if he had sufficient interest to inquire into the constitutionality of the provisions complained of, and even if they should be held to be unconstitutional, as alleged, that would not render the balance of the act unconstitutional.

We now undertake to pass upon the constitutionality of the act in question, only so far as the same is presented properly by the issues of this case. So far as that act affects plaintiffs or concerns their interests, we are decidedly of opinion that it is constitutional. We think it constitutionally divests the plaintiffs of all police powers and confers the same upon the Board of Metropolitan Police.

We think therefore that the plaintiffs were wholly without interest in the matters complained of; that they enjoined the defendant without any warrant or authority of law, and that the District Judge did not err in maintaining the motion to dissolve.

It is therefore ordered that the judgment be affirmed with costs.

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NO. 753.—E. HOLLINGSHEAD v. L. STURGIS, Executor, and another.

The act by which a testamentary disposition is revoked must be made in one of the forms prescribed for testaments and clothed with the same formalities.

A noncupative will by private act, not having been read by the testatrix to the witnesses, nor by one of them to the rest, in her presence, is invalid as a testament, and will not operate as a revocation of a valid will.

A letter written by the testator, posterior to the date of the last will, not clothed with the formalities required for a testament, will not operate a revocation of the last will and testament of the deceased.

APPEAL from the Fifth District Court, parish of East Feliciana. *Posey, J. W. F. Kernan*, for plaintiff and appellant. *Cross, Hardee & Muse* and *E. T. Merrick*, for defendant and appellee.

WYLY, J. Mary Kelper, wife of the defendant, Louis Sturgis, died without issue, leaving considerable property in the parish of East Feliciana, and leaving her olographic will made in 1851, which was duly admitted to probate and ordered to be executed.

In this will, after making certain special legacies, she devised the mass of her estate to John B. Sturgis, the son of her husband by a former marriage, reserving, however, to the latter the usufruct, use

E. Hollingshead v. L. Sturgis, Executor, and another.

and habitation thereof during his life time and making him executor of the will.

The plaintiff, E. Hollingshead, the mother and forced heir of the deceased, claims her property on the ground that the olographic will has been revoked by a posterior will, in nuncupative form, under private act, made in 1859, and also by a letter of the testatrix to her mother after the confection of the second will, informing her of the change in her testamentary disposition and that John R. Sturgis, her universal legatee in the olographic will, should not have one cent of her property.

The nuncupative will by private act was contested by Sturgis and adjudged to be null and void on the ground that the necessary formalities for a valid testament had not been complied with, the same having been written out of the presence of the witnesses and not read to them by the testatrix, nor read by one of the witnesses to the rest, in the presence of the testatrix, as required by article 1575 of the Civil Code.

Plaintiff seeks to have the olographic will annulled and to receive the property as sole surviving forced heir of her deceased daughter on the ground that the letter which was dated written and signed by the deceased, and the posterior will, in nuncupative form, by private act, although invalid as testaments, are sufficiently formal, as revocatory acts, to set aside the olographic will. She demands, however, that if the olographic will be not annulled, that the legacies thereof be reduced to the disposable portion, and that she have judgment against the executor for the amount due her as forced heir.

This demand is denied by the defendants who declare that the nuncupative will under private act being declared illegal and invalid for want of proper formalities, cannot revoke a valid will, and also that the letter of the twenty-ninth of September, 1859, cannot revoke the last will and testament of the deceased.

The court below rejected the prayer for the revocation of the olographic will, decreeing that the legacies thereof be reduced to the disposable portion and that plaintiff have judgment only for the amount due her as forced heir.

Plaintiff has appealed.

It is not pretended that the letter and nuncupative will are valid as testaments, but it is urged that they are acts clothed with sufficient formalities to revoke the olographic will under which the defendant, John R. Sturgis, claims the property of the deceased as universal legatee.

What are the formalities of acts of revocation? Article 1685 of the Civil Code declares that "The act by which a testamentary disposition is revoked *must* be made in one of the forms prescribed for testaments, and clothed with the same formalities."

The nuncupative will by private act was not clothed with the neces-

ary formalities prescribed by article 1575, not having been read by the testatrix to the witnesses, nor by one of them to the rest in her presence.

It was a nullity under article 1588, which declares that the formalities to which testaments are subject "must be observed," otherwise they are null and void.

If the nuncupative will upon which plaintiff relies in this suit to establish the revocation be invalid, as a will, for want of proper formalities, as has been decreed, it cannot be valid as a revocatory act, because the law prescribes for the latter the same formalities. C. C. 1685. The revocation of testaments mentioned in article 1684 of the Civil Code is explained by articles 1685, 1686, 1687, 1688 and 1689, from all of which we collect that there are two modes of revoking a valid testament, the one by a written instrument intended as a testament or last will, and the other by an act intended to take effect in the life time of the testator which is contrary to the disposition of the testament, such as a donation *inter vivos* or a sale of the property bequeathed.

If the testator elects the former he must pursue the rule laid down by article 1685 and clothe the instrument intended to take effect in the future with all the formalities of a solemn act. If, however, he desires the revocation to be effective in his life time he must conform to the mode indicated by articles 1688 and 1689.

The pretended nuncupative will does not conform to either of the modes indicated by law, and therefore produces no revocation whatever.

The decision in *Fuselier v. Masse et al.*, 4 L. 427, upon which the plaintiff relies to sustain her position, that an instrument invalid as a will, on account of its informalities, may be valid as an act of revocation, was rendered upon an instrument executed in 1799, long prior to the enactment of the Civil Code; and we cannot regard that decision as a judicial interpretation of any of the articles of our Code to which we have adverted.

The letter written by the testatrix to the plaintiff on twenty-ninth September, 1859, was not a testamentary disposition. It was not a solemn act, although written dated and signed by her. It evidently was not intended as such. It contained no institution of heir, no dispositions *causa mortis*, nor any expressions indicating a last will. C. C. 1564.

It was merely an ordinary letter to her mother in which she expressed dissatisfaction with her universal legatee, saying, "I told John if he went back to his wife I would not give him one cent of my property. I have changed my will and he shant have one cent of it. I am satisfied with him," etc.

This letter does not furnish evidence of that formal and solemn character necessary to establish the revocation of a will. C. C. 1564, 1568, 1453, 1455 and 1685.

It is therefore ordered that the judgment appealed from be affirmed with costs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
MONROE.

JULY, 1869.

PRESENT:

HON. JOHN T. LUDLING, *Chief Justice.*
HON. J. G. TALIAFERRO,
HON. R. K. HOWELL,
HON. W. G. WYLY,
HON. W. W. HOWE, } *Associate Justices.*

No. 69.—STATE OF LOUISIANA ex rel. EUGENE MCCARTHY v. WILLIAM J. MANNING.

An appeal will not lie from an interlocutory judgment permitting a prayer for a jury to be filed and continuing the case, nor for sustaining a challenge to the array of jurors. If these orders have been improperly rendered they may be corrected on appeal from the final judgment. C. P. 500; 11 R. 400.

A PPEAL from the Sixth District Court for the parish of Orleans. Cooley J. S. Belden, Attorney General, and A. P. Field, for plaintiff and appellant, Braughn & Ogden, for defendant and appellee.

Howe, J. The plaintiff in his petition of appeal "represents that on the decision and interlocutory judgment rendered in the foregoing case there is manifest error that works irreparable injury to the relator," and he prays for the appeal which is now before us.

We find by the record that there were two orders or interlocutory judgments from which it seems that an appeal was thus sought to be taken, one permitting the defendant on the nineteenth June, 1869, the day the cause had been fixed for trial, to file a prayer for a jury and

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State of Louisiana ex rel. Eugene McCarthy v. William J. Manning.

ordering the case to be continued to the second July, the other rendered on the second July, 1869, sustaining a challenge to the array of jurors, discharging them from further attendance and continuing the case.

The appellee has moved to dismiss the appeal on the ground that the orders appealed from do not work irreparable injury, and in our opinion the motion should prevail.

The law does not favor the bringing of a case before the appellate tribunal in fragments, and therefore provides for an appeal from interlocutory judgments only when the injury they cause may be irreparable. The orders complained of in this case are not of that character. If erroneous they may be corrected on appeal from the final judgment, in case that final judgment should be given against the relator. If the final judgment should be in his favor the alleged error will not affect him. The delay of which he complains is not such an injury as authorizes an appeal. 3 M. 325; 10 M. 442; 11 M. 276; 3 N. S. 25; 15 L. 521; 1 N. S. 599; 11 R. 486.

It is therefore ordered that the appeal herein be dismissed with costs

No. 36.—C. YALE, JR., & Co. v. OLIVER & DRAKE.

The affidavit of a party, received without objection, showing that a letter book has been lost, which contains the correspondence between the defendants and their agent or depositary, is sufficient to authorize the introduction of secondary evidence to prove their contents. The agent or depositary of cotton, during the late war, cannot be held liable, where it is shown that it was destroyed by overpowering force.

APPEAL from the Twelfth Judicial District Court, parish of Ouachita. *Crawford, J. J. & S. McEnery*, for plaintiffs and appellants, *Isaiah Garrett*, for defendants and appellees.

TALIAFERRO, J. The plaintiffs bring this suit against the defendants for six bales of cotton, on the following ground. They allege that they are assignees of certain receipts of defendants given in February, 1862, to H. H. Howard for their receipt on storage of the six bales of cotton sued for, the defendants being at that time merchants in the town of Trenton, and keeping a warehouse for the storage of cotton brought to that place for shipment. The receipts specify the marks and weights of the bales. From the widow of Howard, who died in 1864, the plaintiffs aver they received the receipts regularly assigned and delivered to them by one Townsend as the agent of the widow and natural tutrix of the decedent Howard.

The defendants in their answer admit that they received the cotton specified, and aver that soon after the receipt of the cotton the rebel authorities, then holding rule in this portion of the country, issued orders for the removal of all cotton lying near the Ouachita river, at least two miles back from the river, or burned. That defendants informed all their customers of the peril to which their cotton was exposed, and they were requested by Howard to have his cotton re-

moved, which they did accordingly, and had it placed under a shed, and employed a man to take care of it. That afterwards during the war this cotton shared the fate of all other cottons exposed in like manner to the vicissitudes of war; that it was lost by no fault or neglect of theirs, being destroyed by overpowering force and various agencies utterly beyond their power to control.

The defendants had judgment in their favor, and the plaintiffs appealed.

A bill of exceptions was taken to the ruling of the court admitting certain testimony objected to by plaintiffs on the ground—*First*, that parol testimony is inadmissible to prove the contents of instruments of writing disclosed in the interrogatories and answers, the loss or destruction of which not having been first proved. *Second*, that the evidence sought to be introduced disclosed better and higher evidence than the parol testimony offered; which objections were overruled by the court.

The plaintiffs further objected to the admission in evidence of a newspaper advertisement specifying the loss by the defendants of their letter book in which were copies of the letters that passed between defendants and Howard in relation to the removal of the cotton.

We think the objections were properly overruled. True, it appears that the advertisement was inserted in the paper after the institution of the suit. But we find the affidavit of one of the defendants in which he swears to the loss of the letter book containing the correspondence between Oliver & Drake and Howard who deposited the cotton with them. No objection to this affidavit was made. We think, under the state of the facts shown, the defendants were authorized to introduce the secondary evidence.

The proof fully sustains the defendants, and we are satisfied that the judgment of the lower court has done justice between the parties. 8 L. R. 517.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 62.—JOHN C. ROGERS et al. v. C. H. MORRISON, Executor, et al.

The Parish Court is without jurisdiction *ratione materiae* in a suit to annul a sale, when the property involved exceeds in value the sum of five hundred dollars. Constitution of 1868, art. 87.

Where the evidence shows that the testamentary executor has been recreant to his trust, and has administered the estate with a total disregard of the interests of the creditors and heirs, he will be removed from office, and a dative testamentary executor will be appointed according to law. C. C. 1149.

In a suit by the creditors against the executor to remove him from office, evidence offered by the executor, impugning the motives of the attorneys who bring the suit, is irrelevant to the matters at issue, and not admissible.

A PPEAL from the Parish Court of Ouachita. Ray, Parish Judge. Stubbs & Cobb, for plaintiffs and appellants, Morrison & Farmer, for defendants and appellees.

HOWE, J. The plaintiffs, as ordinary creditors of John Liles, Sr., deceased, instituted this suit against the testamentary executor and A. Levi, the purchaser of the property hereinafter mentioned, to annul the sale and to cause the executor to be removed from his office.

The decision recently made in the case of *Swan v. Gayle* will dispose of this case so far as it is a demand for the annulment of the sale and against the defendant Levi, since the property involved appears to be of value largely exceeding the sum of five hundred dollars.

We will proceed therefore to examine the case upon its merits, only upon that branch which concerns the demanded removal of the executor.

John Liles, Sr., died in the parish of Ouachita on the twentieth of November, 1867; on the twenty-sixth of November, 1867, his testamentary executor having qualified, obtained an order for an inventory of the estate, and the inventory was accordingly made. The item with which we are specially concerned consists of the plantation on which the deceased was residing at the time of his death, and also a tract known as the "Frantum Place," which together are described in the inventory as containing five hundred and seventy and forty-three one hundredths acres, and are appraised at thirty-five dollars per acre; as the Frantum Place contains about two hundred and ten and one-half acres it thus appeared that the home place contained about three hundred and fifty-nine and one-half acres.

On the twentieth of March, 1868, the executor obtained an order to sell the property of the estate, and it was accordingly advertised. In the advertisement the five hundred and seventy and forty-three one hundredths acres were described in two tracts as follows:

First—"A plantation on the Ouachita river seven miles below Monroe, upon which deceased resided, bounded above by lands of R. W. Richardson, and below by lands of the heirs of Reuben Frantum, containing three hundred and fifty-nine and a half acres, *more or less*, with all the improvements thereon.

Second—"Another plantation known as the Frantum Place containing two hundred and ten and three one hundredths acres, *more or less*, with all the buildings and improvements thereon, bounded above by lands of the estate of Reuben Frantum, and below by lands of R. W. Richardson."

At the first offering, on the fourth of May, 1868, only a quantity of personal property was sold, and the remainder of the property was advertised for sale at twelve months credit, by the same description. At the second offering the home place was adjudicated to the defendant A. Levi for the price of five thousand two hundred and fifty dollars.

The plaintiffs allege that this home place really contained about five hundred and ninety acres, instead of three hundred and fifty-nine and

a half acres; making a difference in value according to the appraisement of upwards of eight thousand dollars; that this excess consisted of a tract of two hundred and thirty-four acres conveyed to Liles by John F. Parker February 9, 1850; that the executor failed to have this large tract placed on the inventory, although he was aware that it belonged to the succession, and formed a part of the home place; that he was informed before the final adjudication to Levi that the tract so adjudicated contained also the tract of two hundred and thirty-four acres; and that he caused the place to be advertised by metes and bounds not fixed in the inventory as three hundred and fifty-nine and a half acres, more or less, the effect of which would of course be to convey to the *bona fide* purchaser, if the sale was valid, the whole number of acres contained within the bounds given, even if much more than three hundred and fifty-nine and a half acres.

They make many averments of fraud on the part of the executor and Levi, and of collusion between them.

We think it established by the record that the home place really contained about five hundred and ninety acres, and that its sale for five thousand two hundred and fifty dollars, if maintained, would result in a great loss to the estate. And leaving out of view the questions of fraud and collusion, which will come before the proper tribunal in case another action is brought to annul the sale, we are constrained to decide that the executor has been at least so grossly careless in respect to this matter that his removal from office is properly demanded. C. P. 1013, 1019; C. C. 1149.

It appears that he has been recorder of this parish; that he was a neighbor and intimate friend of the deceased; that he was a witness to the act of sale from Parker to Liles of the omitted tract; that this act was recorded and indexed at the time the inventory was made; that as the attorney of Liles he had occasion to know that during the last year of his life the decedent rented three hundred acres of cleared land of the home place to Hardy, and cultivated himself about one hundred and forty acres; that, at the first offering of the property, he was admonished by Judge Richardson that the place contained upwards of five hundred acres; and that he was under the impression himself, as appears by his own evidence, that the plantation contained more land than the advertisement described; and yet, under such circumstances as these, without making a secrecy, he causes the place to be sold *per aversionem*, in such way that (if the sale be not hereafter annulled) the defendant Levi will secure five hundred and ninety acres instead of the three hundred and fifty-nine and a half acres which were inventoried and advertised.

The executor states that he caused the sale to be made *per aversionem* to avoid litigation. If he had feared that there might be less than three hundred and fifty-nine and a half acres in the tract we could see

John C. Rogers et al. v. C. H. Morrison, Executor, et al.

the force of this argument in his behalf; but under the circumstances we have detailed, the very method of the sale seems to be weighty evidence of a disregard for the interest of the succession and the creditors.

It is objected that the claim of the plaintiff Rogers is invalid, and that he is without interest to prosecute this case, but as there is no such objection to the claim of the other plaintiffs, H. Gerson, Jr., & Co., we do not find it necessary at this time to pass upon this point.

The defendants reserved a bill of exceptions to the refusal of the court *a qua* to allow evidence concerning the motives of one of plaintiffs' attorneys in bringing this suit. The court did not err in its ruling. The testimony was irrelevant to the issues presented.

For the reasons given it is ordered and adjudged that the judgment of the Parish Court be avoided and reversed.

It is further ordered that the demand of the plaintiffs against the defendants for the annulment of the sale be dismissed for want of jurisdiction in the Parish Court and without prejudice.

It is further ordered that Charles H. Morrison, testamentary executor of the succession of John Liles, Sr., be, and he hereby is, removed from his office; that he file an account of his proceedings as executor of said succession; that a dative testamentary executor be appointed to execute the provisions of the will of the said decedent, and to settle the affairs of said estate according to law, and that the costs be paid by Morrison, executor, the appellee.

Rehearing refused.

No. 17.—JAMES W. B. MELSON v. WILLIAM SANDEL.

Where the certificate of the clerk of the District Court to a transcript of appeal makes no mention of any testimony having been adduced and there are no bills of exceptions or assignment of errors in the record the appeal will be dismissed on motion.

APPEAL from the District Court, parish of Morehouse. *Crawford, J. John Ray*, for plaintiff and appellant, *Todd & Brigham*, for defendant and appellee.

HOWE, J. This is an appeal by defendant from a judgment by default. The citation was served February 13, 1865, a default was entered June 6, 1866, and was made final more than three days after, and the judgment was read and signed in open court on the sixteenth June, 1866. On the eighteenth June the defendant filed a motion for a new trial based upon his affidavit that the fact of having been cited had escaped his attention; that he supposed the citation to be null and void for the reason that the clerk and sheriff were, at its date, professing allegiance to the so called Confederate government, and that he had a defense on the merits which is set forth in detail.

The appellee has moved to dismiss the appeal on the grounds—

James W. B. Melson v. William Sandel.

First—There was no testimony taken down by the clerk on the trial of this case, he not having been requested to do so by either party. C. P. 601.

Second—Neither the appellant nor his advocate, either before or after the appeal was taken, required the adverse party or his advocate to draw up jointly with him a statement of facts, and no such statement of facts was drawn up. C. P. 602.

Third—No statement of facts at the request of either party was made out by the court in this case. C. P. 603, 896.

The certificate of the clerk states that the record before us contains a full, true, complete and correct transcript of all the proceedings had, and all documents filed in the cause, but makes no mention of testimony adduced. There is neither assignment of errors nor bill of exceptions to be found in the record. C. P. 897.

The appeal must be dismissed, since the record does not enable us to examine the case upon its merits. The reason of this rule is well illustrated in this particular instance, as this is a case where the appellant makes an earnest appeal to the equitable discretion of this court to grant a new trial upon his statement of the merits of the case, but does not furnish us with any data to determine what showing the plaintiff made in the court below. 10 La. 38.

It is therefore ordered that the appeal herein be dismissed with costs.

No. 69.—A. LEVI & CO. v. JOHN M. CARTER.

Receipts, bearing date prior to the settlement of the parties by note, cannot be pleaded as a demand in compensation and reconvention against the note.

A promissory note of a third party, due the defendant, cannot be set up in compensation against a demand of the plaintiff on the note of the defendant.

A PPEAL from the Twelfth Judicial District, parish of Morehouse. *Crawford, J. Todd & Brigham*, for plaintiffs and appellees. *D. C. Morgan*, for defendant and appellant.

TALIAFERRO, J. The plaintiffs sue the defendant on a promissory note executed by him in their favor on the eleventh of December, 1861, for twenty-six hundred and fifteen dollars and fifty-two cents, payable on twenty-second of May, 1862, with eight per cent. per annum interest from maturity; and also on an account for one hundred and thirty-four dollars and fifty-two cents, with interest, alleged to be for plantation supplies furnished the defendant in the early part of the year 1862.

The defendant pleads compensation, and claims in reconvention from the plaintiffs, the sum of eleven thousand and seventy-six dollars and thirty-one cents, with eight per cent. interest per annum on the various amounts specified from the respective periods at which, as he alleges, they severally became exigible.

On the fifth of July, 1866, a judgment was rendered in the court below in favor of the plaintiffs on the note, and a judgment of nonsuit against them as to the account.

A new trial was granted on the application of the defendant, and the case was tried a second time with nearly the same result, a judgment being rendered on the fifteenth of January, 1869, for the amount of the note in favor of the plaintiffs, and judgment of nonsuit against the defendant on his reconventional demand.

From the judgment so rendered the defendant has appealed.

In this court the plaintiffs have moved to amend the judgment of the lower court by rejecting the reconventional demand instead of confirming the judgment of nonsuit.

In regard to the pleas of compensation and reconvention we find that plaintiffs on the twenty-sixth of January, 1860, gave the defendant a receipt for eight hundred dollars in bank notes and sundry drafts on merchants in New Orleans, amounting to the sum of \$4497 03 to be placed to his credit, and for two drafts and a note on R. A. Buel amounting in all to \$1166 28 "for collection." About a year afterwards, on the twenty-fourth of January, 1861, the plaintiffs gave their receipt to the defendant for six hundred and twenty dollars, cash, a sight draft of Tullis on James Watts & Co. for \$2043 and a promissory note of G. M. Brown, in favor of defendant, for \$2750, with eight per cent. interest from twentieth January, 1860. This receipt does not express the disposition that was to be made of these assets.

The note of the defendant upon which the plaintiffs bring suit is dated December 11, 1861, nearly a year after the last receipt was given and nearly two years after the first. It is fair to suppose that, if before the liquidation of the plaintiffs' accounts by note, these various drafts and notes and the money specified in the plaintiffs' receipts were to compensate their accounts, there would have been a settlement between the parties and a balance struck. There is no showing in the record that such compensation was intended in regard to the plaintiffs' account settled by note on the eleventh December, 1861. In fact the defendant seems to rely chiefly upon the notes of Brown and Buel to offset the note sued upon by the plaintiffs, leaving the inference that the money and drafts mentioned in the first receipt were applied to previous indebtedness of the defendant. These notes it seems were not transferred to the plaintiffs, for the defendant, in his own testimony, on the last trial, says, speaking of the Brown note, "I have no recollection of having indorsed it—I consider that the note is mine. I left the note with A. Levi & Co. for the money to be paid there when it became due, and placed to my credit or subject to my draft." Chapman, a witness whose testimony was taken under commission, in February, 1867, says that Levi told him during "the last winter that he had made arrangements with Brown, and would take his note and give Carter (the defendant) credit for the amount of the indebtedness."

A. Levi & Co. v. John M. Carter.

A letter from the plaintiffs to the defendant under date of eleventh of September, 1865, is introduced in evidence. In that letter the defendant is informed that the note of G. M. Brown was placed in the hands of attorneys for collection about two months previous, and that one of them had gone to see Mr. Buel. The writer adds: "I have not heard of the Buel note, although I have written some time ago to the attorney at Natchez. I will do so again in a few days, and will then inform you of the result." If under any obligation to collect these notes, which is by no means established, it would seem that the plaintiffs were not inattentive to the matter. It is not made to appear that they ever received anything on these notes, nor that any injury has resulted to the defendant by their laches in failing to prosecute the claims. The statement of Levi to the witness Chapman, in a casual conversation, somewhere, as he says, in New Orleans, or on a boat, we cannot consider conclusive, especially when taken with the general drift and bearing of the evidence, which, on the whole we think does not entitle the defendant to a credit on the note upon which this suit is brought, and the more so, as after having obtained a new trial and a delay of more than two years he has failed to make out a clear and satisfactory claim against the plaintiffs.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 55.—THOMAS H. BROWN v. AUGUSTUS H. BROWN, JAMES W. WILSON, Administrator, Intervenor.

Where there is no answer to an amended petition containing matters of substance, nor default taken, all subsequent proceedings are irregular and will be set aside on appeal, and the cause remanded to be proceeded with according to law.

A PPEAL from the Eleventh Judicial District Court, parish of Claiborne. *Crawford, J. John Young*, for plaintiff and appellant. *A. B. George*, for intervenor, appellee.

HOWE, J. The plaintiff sued for the possession of a promissory note for \$9323 85, of which he claimed to be owner, alleging that it had been deposited with the defendant for safe keeping.

James W. Wilson, administrator of the succession of Leonidas C. Ferrill, intervened, alleging that the note had been deposited with the defendant by Ferrill to be delivered up to the maker, Chalaron, upon certain conditions, which had not been fulfilled, and that it should be returned to the succession.

Upon the trial, after the plaintiff had closed his evidence, the intervenor moved to amend his petition and the court granted permission. The amended petition alleged simulation and fraud in the transfer from Ferrill to T. H. Brown, under which the plaintiff claimed title. The plaintiff reserved a bill of exceptions to the ruling of the court in permitting the amendment, but we think the court did not err. The intervenor, so far as we can discover from the record, was first informed

Thomas H. Brown v. Augustus H. Brown, James W. Wilson, Administrator, Intervenor.

of the circumstances under which the note was transferred to the plaintiff, by the plaintiff's testimony at the trial. This was of such a nature that justice required the amendment to be allowed. The "substance of the demand" was not changed. It was still a demand for possession of the note. 12 Ann. 59; 8 N. S. 298. No issue was joined upon this amended petition either by answer or default, but the trial being proceeded with there was judgment for the intervenor. Under the facts, as disclosed, we regret the necessity of disturbing this judgment; but we think it well settled that where there is no answer to an amended petition nor default taken, if the amendment be one of substance, and not of form, all subsequent proceedings are irregular and will be set aside. If there be no answer or default there is no *contestatio litis* which is the very foundation of the suit. *Hughes v. Hamson*, 8 N. S. 298; *Heirs of Ballie v. Prudhomme*, 8 N. S. 338; *Caldwell v. Fales*, 2 La. 130; *Allain v. Preston*, 2 La. 392 and 4 La. 13; *Knight v. Knight*, 12 Ann. 60.

In such a case the cause should be remanded that the *contestatio litis* may be formed and a new trial had.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed, and that the cause be remanded to the District Court to be proceeded with according to law, and that the appellee pay the costs of the appeal.

No. 24.—GILLIS & FERGUSON v. R. H. CUNY.

The appointment of an advocate to represent the absentee in an attachment suit may be made before service of citation.

APPEAL from the Twelfth District Court of the parish of Caldwell. *Crawford, J. Thomas J. Hough*, for plaintiffs and appellants, *John Ray*, for defendant and appellee.

LUDELING, C. J. A motion to dismiss this appeal has been made on the ground that the certificate of the clerk to the transcript filed in this court is defective, in this, that it does not certify that the record contains all the documents filed, evidence adduced and proceedings had on the trial of the case. The certificate is that "the foregoing is a true copy of all the proceedings had, all the documents filed and evidence adduced in the case of *Gillis & Ferguson v. R. H. Cuny*," etc. We think the certificate sufficient. If the certificate be true, all the proceedings had, documents filed and evidence adduced on the trial are contained in this record. The motion is refused.

The plaintiffs, alleging that the defendant was a non-resident, sued out an attachment against his property. The advocate appointed to represent the defendant filed an exception to the proceedings on the ground that the defendant had not been legally cited.

It appears that a copy of the petition, citation and writ of attachment were issued by the clerk in January, 1866, and that an inventory of property attached was made on the thirteenth of February, 1866.

Gillis & Ferguson v. R. H. Cuny.

There is nothing to show that the citation and attachment were served, and the sheriff who made the attachment having died, the plaintiffs caused another writ of attachment and citation to be issued on the twenty-eighth of September, 1866.

The second citation and writ of attachment were served by the sheriff by posting them at the door of the court house. This was a compliance with the requirements of the law, and the defendant was constructively cited. C. P. article 254. The law does not declare that the appointment of an advocate before service of the citation shall be null, and we can not perceive any good reason for deciding the appointment void. The object of the law in requiring the appointment of an advocate to represent the absentee is that the legal rights of the defendant should be protected, and this object would be as well attained whether the appointment were before or after the posting of the citation.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, that the exception be overruled, and that this case be remanded to the District Court to be proceeded with according to law. It is further ordered that the appellee pay the costs of appeal.

No. 42.—WILLIAM M. GUICE v. SHERIFF SANDERS et al.

The precarious possession of personal property carries with it the presumption of simulation, C. C. 2456, 16 An. 5, but this presumption may be disputed by the vendee showing the reality of the sale.

Where the evidence shows that the sale of personal property was real and bona fide the injunction will be perpetuated against the seizing creditor of the vendor.

APPEAL from the Twelfth Judicial District Court, parish of Franklin. *Crawford, J. H. P. Wells*, for plaintiff and appellant, *Thomas J. Hough*, District Attorney, for the State, *et al.*, appellees.

HOWE, J. The defendants seized under execution, issued upon a judgment in favor of the State, a number of horses, mules and other stock as property of Moses S. Guice. The plaintiff, William M. Guice, enjoined, claiming the property.

The defendants answered that Moses S. Guice was the owner of the property, had been in possession of it for five years past, and that any pretended transfer thereof to the plaintiff was a simulation. There was judgment for the defendants, and plaintiff has appealed.

If Moses S. Guice was in possession of the property after the alleged sale and at the time of the seizure, the evidence shows that he was so by the leave of the plaintiff. The possession was precarious (C. C. 3522), and the sale would therefore be presumed to have been simulated. C. C. 2456; 7 N. S. 675; 4 R. 437; 16 A. 5. But this presumption is not a conclusive one, it may be disputed by the vendee showing the reality of the sale,

William M. Guise v. Sheriff Sanders et al.

A careful examination of the testimony has satisfied us that the sale was a reality, and as the question whether or not it was a simulation is the only one now before us, we feel it our duty to reverse the judgment and perpetuate the injunction.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed, and that there be judgment in favor of the plaintiff perpetuating the injunction issued herein with costs.

NO. 47.—ALLEN GREENE v. MAYFIELD JOHNSON, Sheriff, et al.

An injunction can not issue to stay execution on grounds which might have been pleaded in defense before judgment.

Execution can not legally issue on a judgment rendered on default until after notice of judgment has been served on the defendant. C. P. 575, 624; 6 R. 20.

A PPEAL from the Eleventh Judicial District Court, parish of Jackson. *Crawford, J. John Ray*, for plaintiff and appellee, *J. & S. D. McEnry*, for defendants and appellants.

Howe, J. On the eighth April, 1857, John G. Randle & Co., a firm of which Allen Greene, the plaintiff, was junior partner, executed their note to C. Yale, Jr., & Co. for \$2533 45 at nine months. One hundred dollars was paid on account of the note, and about the nineteenth March, 1858, certain notes and accounts were handed to the agents of C. Yale, Jr., & Co., as collaterals, amounting to \$2709.

On the note first named suit was instituted by C. Yale, Jr., & Co. in September, 1858, in which judgment was rendered October 1, 1858. Execution having been issued on this judgment against property of Allen Greene, the plaintiff in the case at bar, he sued out the injunction now before us, on two grounds:

First—That the note had been *settled* by John G. Randle, one of the firm, who delivered to C. Yale, Jr., & Co. the collaterals above mentioned, “which collaterals,” the petition continues, “are now in possession of D. R. Thompson, Esq., or at least so much of them as the balance uncollected, all of which petitioner avers ought to have been and would have been collected but for the negligence of the said C. Yale, Jr., & Co. Petitioner further avers that these collaterals were delivered to C. Yale, Jr., & Co. some time previous to the insolvency of the said John G. Randle, and but for the negligence of plaintiffs and their retention of the notes and claims placed in the hands of plaintiff’s petitioner, could have had said debt paid in full.”

Second—That no judgment notice, as required by law, had ever been served on the petitioner.

There was judgment for plaintiff in injunction, reciting that the judgment in favor of C. Yale, Jr., & Co. had been compensated and extinguished, and decreeing that the injunction be perpetuated, and the defendants have appealed.

Allen Greene v. Mayfield Johnson, Sheriff, et al.

We are unable to perceive the first ground alleged for an injunction, and the evidence adduced upon that branch of the case, furnish any basis for the judgment appealed from. If the note of April 8, 1857, was "settled" by Randle, that fact should have been pleaded and proved before the judgment complained of—a judgment rendered some months after the alleged settlement. An injunction can not issue to stay execution on grounds which might have been pleaded in defense before judgment. 6 Rob. 17. Nor do the allegations and proof show that the judgment against the petitioner has been compensated and extinguished. The claim alleged by petitioner to result in his favor from the *laches* of C. Yale, Jr., & Co. in realizing upon the collaterals, is not liquidated; and a debt not liquidated can not be offered in compensation of an execution. 9 R. 137; 10 Ann. 734; 7 L. 564; 9 La. 22; 14 A. 333. The evidence does not establish this claim of petitioner with any exactness, if indeed it establish it at all.

The second reason for the injunction has more force. The judgment was by default, and execution can not legally issue in such case until notice of the judgment has been served on the defendant. C. P. 575, 624; 3 La. 237; 6 R. 20. The clerk of the court testified that he knew of no notice of judgment ever having been issued or served in the case of Yale v. Randle, and could find no evidence among the papers of such notice ever having been issued or served. We think this a sufficient showing on the part of plaintiff in support of his negative averment to shift the *onus* upon the defendants and require them to make some proof of a service of notice.

The injunction issued in this case should have been perpetuated so as to restrain the execution of the writ of *fi. fa.*, but the court erred in declaring the judgment compensated and extinguished.

It is therefore ordered that the judgment appealed from be avoided and reversed so far as it declares the said judgment of C. Yale, Jr., & Co. v. John G. Randle & Co. to be compensated and extinguished, and that in other respects the judgment be affirmed, without prejudice to the right of the judgment creditors to issue execution after due notice given. It is further ordered that the defendant pay the costs of the District Court, and that the plaintiff and appellee pay the costs of the appeal.

No. 63.—WILLIAM S. MCINTOSH, Administrator, v. D. McLEOD, Administrator.

Citation of appeal must be served on the appellee if he reside in the State, and on the advocate if he be a non-resident. C. P. 582. Service on the agent is not good.

A PPEAL from the Twelfth District Court of the parish of Franklin. Crawford, J. H. P. Wells, for plaintiff and appellant. John Ray, for defendant and appellee.

William S. McIntosh, Administrator, v. D. McLeod, Administrator.

LUDELING, C. J. D. McLeod, administrator of the succession of Alexander McLeod, was sued for \$2000, with eight per cent. per annum interest from fifth of February, 1861.

The defendant appeared by his counsel, who filed an answer and conducted the defense until final judgment in the District Court.

The plaintiff applied by petition for an appeal, and he caused the citation to be served on John McLeod, who, he says, was the agent of D. McLeod, administrator. A motion to dismiss the appeal for want of citation has been filed.

The motion must prevail.

The sheriff must serve the citation on the appellee, if he reside in the State, or on *his advocate*, if he reside out of the State, by delivering a copy of the same to such appellee or to his advocate, or by leaving it at the place of their usual domicile. C. P. article 582; *McMicken v. Smith*, 5 N. S. 428; 4 La. 317.

It is therefore ordered that the appeal be dismissed.

No. 37.—MARY A. WARFIELD v. A. J. BOBO et al.

A notarial transfer by the husband to the wife of property in payment of her judgment against him, cannot be canceled and annulled by a subsequent agreement between them.

Contracts between the husband and wife are forbidden except in the cases specially enumerated in article 2421 of the Civil Code.

Where the transfer of real estate is absolutely null and void the creditor may proceed against the property as though it had not been interposed. 12 An. 173.

The prescription of one year cannot be invoked by a party holding under a void title.

APPEAL from the District Court, parish of Morehouse. *Crawford, J. Isaiah Garrett*, for plaintiff and appellant. *John T. Ludeling and S. G. Parsons*, for defendants and appellees.

HOWELL, J. The plaintiff, separate in property from her husband, W. J. Knox, enjoined certain executions, issued by J. R. Temple, upon judgments obtained by creditors against Temple & Knox, a firm once composed of said J. R. Temple and W. J. Knox, upon the ground that she is the owner of the property seized, by purchase from her husband. The defense is that the pretended transfer from Knox to his wife is a simulation and fraud perpetrated by them to screen the property of Knox, who was insolvent, from the pursuit of his creditors; that prior to the date thereof all the claims of the wife against her husband were satisfied and extinguished, and that the said transfer is an absolute nullity, being made by parties incapable of contracting.

Judgment was rendered dissolving the injunction, declaring the act of sale of the property in question simulated, null and void, and condemning the plaintiff and her surety, *in solido*, to pay J. R. Temple \$319 80 general damages, two hundred dollars as attorney's fees and costs, from which they have appealed.

In an injunction suit based on the ground that the property seized does not belong to the judgment debtor, but to the plaintiff in the

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injunction, the question of ownership is the only one which can be examined. 12 A. 172, 181. Hence the judge *a quo* did not err in not permitting the amended petition to be filed by the plaintiff.

It is shown that plaintiff obtained a judgment against her husband, the amount of which, except \$316 23, she received, in a contest with his creditors, and in satisfaction and payment of said balance of \$316 23, she subsequently accepted from her husband a notarial transfer of notes, judgments and accounts belonging to him and amounting to \$3317 22, less the sum reserved out of them sufficient to pay a debt of one hundred and seventy dollars garnisheed in the hands of the husband's attorneys. Two years after this, and in the act of sale of the land in question to plaintiff, the parties declared that they canceled and annulled the foregoing transfer, thus leaving, as stated in the act, the husband indebted to his wife on said judgment in the said sum of \$316 23, with legal interest as allowed thereon and to pay which and the further sum of two hundred and twenty-five dollars, acknowledged in the act to have been advanced to the husband by the wife, to purchase the land from the government, the husband transfers said land to his wife.

It is clear that this act did not accomplish what the parties seem to have proposed, for it is legally certain that the sum of \$316 23 was not due the wife. She had formally accepted a notarial transfer of property in full payment of her judgment and the parties were totally incompetent to rescind said transfer by any act between themselves and revive the judgment. And we are not prepared to admit that they could enter into a contract of loan and make the husband a debtor of the wife as was attempted. It may here be remarked that the record shows that the land was entered by a military warrant. By the Code contracts between husband and wife are forbidden (article 1784), except in those cases only which are specially enumerated in article 2421. Out of these enumerated exceptions all attempted contracts between them are nullities. 1 A. 301; 2 A. 483; 4 A. 65. The contract under consideration is not within these exceptions. It proposes to undo a settlement of the wife's paraphernal rights and to create a debt against the husband, which is not permitted, and hence there was no consideration for the pretended transfer.

It is a contract without legal existence, and as to creditors is a mere shadow on the title of the husband, and they may proceed against the property as though it had not been interposed. 12 A. 173. As a necessary consequence, the prescription of one year filed in this court does not apply. 2 A. 483; 4 A. 71.

The views herein adopted render it unnecessary to pass on the bills of exception on the question of evidence.

Each party has asked an amendment of the judgment for damages. The two sums allowed do not together amount to twenty per cent. on

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the value of the land assumed by the District Judge, which is the average of the estimates made by the sheriff and by a witness, and we have no means of making a more accurate estimate than the judge of the first instance.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Mr. Chief Justice Ludeling recused.

No. 70.—D. H. WILLIAMS v. D. B. DOUGLASS, Sheriff, et al.

A writ of injunction issued by the clerk of the District Court before the adoption of the Constitution of 1868, did not become void on the adoption of the constitution. Article 136 of the constitution continued the laws in force in relation to the duties of officers until the organization of the government under the constitution, although contrary to it.

An agent of an absentee holding a general power of attorney is competent to make the necessary oath to obtain a writ of injunction on behalf of his principal.

The motion to dissolve the injunction on the ground that the allegations in the petition are not true, must be referred to the merits.

A party applying for an injunction need not allege technically that "he will be injured."

A PPEAL from the Twelfth District Court of the parish of Morehouse. Crawford, J. D. C. Morgan, for plaintiff and appellant. Morrison & Farmer, for defendants and appellees.

LUDELING, C. J. On the twenty-first day of April, 1866, Warren & Crawford obtained an order of seizure and sale against the property of D. H. Williams, an absentee, and they were proceeding to sell said property when the plaintiff in this suit obtained a writ of injunction to prevent the sale.

The defendant moved to dissolve the injunction, with damages, on several grounds. We will notice only those insisted on in this court, in their order.

First—That the injunction was granted by the clerk of the District Court, who was prohibited by the Constitution of 1868 from exercising judicial functions. The writ was issued on the sixth day of June, 1868, anterior to the organization of the government under the constitution of 1868. And by the one hundred and fiftieth article of said constitution, the laws in relation to the duties of officers remained in force until the organization of the government under it, although contrary to the provisions of the constitution.

Second—That the agent was not authorized to make the affidavit.

The affidavit was made by D. C. Morgan, one of the attorneys-at-law, who signed the petition for the injunction, and the agent of the plaintiff. The affidavit states these facts. The power of attorney declares that D. H. Williams, of the county of Navarro, State of Texas, has made constituted and appointed D. C. Morgan his agent and attorney in fact in the State of Louisiana to represent him fully in all matters wherein he is interested, and he specially empowers him to do all the acts of ownership specified in article 2966 of the Civil Code.

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We think the power of attorney authorized the agent to make the affidavit.

The fourth and fifth grounds are that the allegations of the petition for injunction are not true. They should have been referred to the merits.

Sixth—The sixth objection is that the plaintiff does not allege that he will be injured. This is not sacramental.

He avers that the note, which is the basis of the order of seizure and sale is prescribed. It is manifest therefore that he will be injured if his property be sold to pay a debt which has been extinguished.

The motion to dissolve the injunction should have been overruled.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, that the motion to dissolve the injunction be refused, and that this case be remanded to be proceeded with according to law. It is further ordered that the appellees pay the costs of appeal.

NO. 28.—B. F. CROWNOVER et al. v. THOMAS W. RANDLE

A sale of a tract of land by one of three joint owners will bind the other two, or either of them, if it is shown that they or either of them were present at the sale and made no objection thereto, but on the contrary advised and urged the sale.

The sale of an undivided tract of land by one of the three joint owners is null as to the interest of the party who was not present at the time and afterward refused to ratify the transaction.

APPEAL from the Eleventh Judicial District Court, Parish of Claiborne. *Watkins, J. J. C. Egan*, for plaintiffs and appellants. *George & Sandlin* and *L. B. Watkins*, for defendant and appellee.

TALIAFERRO, J. This is a petitory action to recover two undivided shares of one-third each in a tract of land. The plaintiff claims one of those shares in his own right and the other in right of a deceased brother's minor child, to whom the petitioner is tutor. The facts as we gather them are these: At a probate sale of their mother's estate which took place in February, 1859, the plaintiff and his brothers, John and William, the latter being the father of the minor represented by the plaintiff, purchased jointly a tract of land lying in the parish of Claiborne. It seems that the tract of land went into the possession of John Crownover, who, on the twenty-sixth of December, 1862, sold it to the defendant by regular notarial act, and the purchaser went into possession by himself or his agent. The plaintiff filed this suit early in the year 1866, praying to be decreed owner of one undivided third part of the land, that the minor he represents be recognized as owner of another undivided third part in right of her father, William Crownover, deceased. He also prays that a partition by limitation be made of the land between himself, the minor and the defendant.

The answer is a general denial. The defendant specially denies ownership either in the plaintiff or the minor of any portion of the land sued for. He avers that his vendor, John Crownover, before selling to him had acquired title to the shares of B. F. and William Crownover; that at the time of the execution of the deed of sale from John Crownover to defendant the plaintiff and William Crownover were present and cognizant of the sale; that by acts and words they assented to it, and represented the property sold as belonging to John Crownover and influenced and induced him to purchase it. That the plaintiff acts fraudulently in setting up a pretended title to the property, which to his own knowledge and with his assent defendant acquired in good faith, and gave for it a valuable consideration. There was judgment in the court below in favor of the defendant, and the plaintiff appeals.

A bill of exceptions was taken to the ruling of the court admitting evidence to prove that the consideration paid by Randle to John Crownover was Confederate money or illicit currency. It is not important to the decision of this case that we should consider this bill of exceptions, and therefore omit it.

A scrutiny of the evidence brings us to the conclusion that as to William Crownover the defendant has fully established his allegations. The testimony is abundant that he was present at the time the sale was entered into; was cognizant of the purpose and intention of the contracting parties and assented to it, if not directly yet expressing by his manner a tacit assent. It is shown that he was present at the time the deed was read and signed and the money paid, and made no objection to the sale. The notary before whom the sale was passed testifies that at the time the deed was executed William Crownover was present in the room, that he did not protest or object to the sale nor claim any interest in the land sold. *Qui tacit, consentire videtur. Qui potest et debet vetare, jubet.* Story's equity jurisprudence, section 385; 5 An. 67, and cases there cited.

It has been well remarked that "when a man has been silent when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to remain silent."

In regard, however, to B. F. Crownover, we think the defendant has failed to show any acquiescence in the sale under consideration. He was not present when it was consummated. It is not shown that he ever in the slightest degree assented to it. He resided ten miles off in another parish. It is shown by defendant that plaintiff frequently passed near the place in going to and returning from Minden, and that on one occasion before the sale, in answer to an inquiry as to what he was going to do with his share in the land, he said that he and his brother William had concluded to let John Crownover have their interests in the land. This is all the evidence defendant adduces to

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show assent and ratification of the sale, and we think it insufficient. No title is shown in John Crownover to the other shares of the land. It results then in our view that William Crownover by his tacit assent to the sale ratified it so far as relates to his share, and that there is not in any manner shown a divestiture of B. F. Crownover's title to his undivided third part of the property.

The defendant shows that he has put upon the premises improvements worth two hundred dollars. One-third of this sum, or eighty-three dollars and thirty-three cents, must be paid by plaintiff to the defendant as the enhanced value of plaintiff's interest in the land produced by the defendant's labor and at his costs.

It is therefore ordered, adjudged and decreed that the judgment of the District Court so far as it recognizes the defendant's right and title to the one undivided third part of the tract of land in controversy, formerly owned by William Crownover, be and the same is hereby affirmed, and as to the recognition of title in defendant of the share and interest claimed by B. F. Crownover, that it be annulled, avoided and reversed. It is further ordered that B. F. Crownover be and he is hereby recognized as the owner of an undivided one-third part of the tract of land in controversy, and more especially described in his petition, and that he enter upon and take possession of the same on paying to the defendant eighty-three dollars and thirty-three cents, the enhanced value of his proportional share of the property. It is further ordered that a partition of the property as prayed for by the plaintiff be made between himself and defendant, joint owners of the land sued for, the claim of plaintiff as tutor to the minor heir of William Crownover being by this decree rejected and disallowed. It is also ordered that this case be remanded to the lower court in order that it may be proceeded with according to law and a partition of the property effected. It is ordered that the defendant and appellant pay costs of this appeal.

No. 66.—WILLIS WOOD, Administrator, v. L. C. CALLOWAY, H. K. CARTER, Third Opponent.

A merchant has a privilege on the crop for the necessary supplies furnished to make it. Act of 1843, amending article 3181 of the Civil Code.

No privilege is allowed on the crop for money advanced to the planter.

APPEAL from the District Court, parish of Union. *Watkins, J. Stubbs & Cobb*, for opponent, appellant. *A. B. George*, for defendant and appellee.

LUDELING, C. J. In 1865 Willis Wood, administrator, attached on the plantation of L. C. Calloway forty-one bales and twenty-two hundred and fifty pounds of cotton belonging to said Calloway. During the pendency of the suit the cotton was sold under an order of Court and the proceeds were held to abide the final decision of the court.

Willis Wood, Administrator, v. L. C. Calloway, H. K. Carter, Third Opponent.

H. K. Carter made opposition to regulate the effect of the seizure, contending that he had a privilege on the cotton or its proceeds superior to plaintiff's, being for necessary supplies furnished to Calloway, and he prayed for a judgment against Calloway for his debt and for a recognition of his privilege on the cotton or its proceeds.

There was judgment in favor of Willis Wood, administrator, and against H. K. Carter rejecting his demands. From this judgment H. K. Carter has appealed.

The evidence satisfies us that the necessary supplies for the plantation of Calloway, to the extent of one thousand and ninety-five dollars and eighty cents, were furnished by H. K. Carter to make the crop of 1861, and that the cotton attached was raised on the plantation in 1861.

Calloway says in answer to interrogatories on facts and articles: "I received *supplies necessary* for the use of my plantation from H. K. Carter to the amount of one thousand and ninety-five dollars and eighty cents."

In *Hollander v. His Creditors* this court said: "The act of 1843, amending article 3184 of the Code, provides that debts due for necessary supplies furnished to any farm or plantation shall be entitled to a privilege on the crop for the making of which those supplies were furnished" (p. 668). There is nothing in the cases of *Shaw v. Knox*, 12 An. p. 41; *McCutcheon v. Wilkins*, 12 An. 483; or *Shaw v. Grant*, 13 An. 52, which militates against this position. The privilege of Carter for necessary supplies should have been allowed. His pretensions for a privilege for any sums of money advanced to Calloway were properly disallowed. But there should have been judgment against L. C. Calloway for the full amount of the note made in favor of H. K. Carter as the debt was duly proved.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed. It is further adjudged and decreed that there be judgment in favor of H. K. Carter against L. C. Calloway for the sum of six thousand seven hundred and fifty-eight dollars and forty-five cents, with eight per cent. per annum interest thereon from the twenty-eighth day of April, 1862, till paid, and costs, and that his privilege on the proceeds of the cotton attached and sold in the suit of *Willis Wood v. L. C. Calloway* be recognized and enforced for the sum of one thousand and ninety-five dollars and eighty cents. It is further ordered that Willis Wood, administrator, pay the costs of the opposition and of this appeal.

No. 64.—STATE OF LOUISIANA v. J. C. GREGOR.

21	473
46	627
21	473
109	351

Declarations or threats of the deceased towards the accused, in order to constitute a part of the *res gestæ*, must be made at the time of the act done which they are supposed to characterize, and so to harmonize with it as to constitute one transaction.

Declarations by the deceased to a witness, towards the accused, made before the homicide and not communicated to the accused, do not form a part of the *res gestæ*, and are therefore inadmissible on that ground.

Declarations or threats made to third parties by the deceased towards the accused before the homicide, are not admissible without first showing that they were communicated to the accused before the killing.

The order of the District Judge overruling a motion for a new trial in a criminal case on the affidavit of newly discovered evidence, presents the question of diligence, and not an unmixed question of law, and cannot be reviewed on appeal. Constitution, art. 74; 11 A. 478.

A PPEAL from the First District Court for the parish of Orleans.
Abell, J. S. Belden, Attorney General, for the State, A. P. Field, for defendant and appellant.

HOWELL, J. The defendant was indicted for the murder of John Collins on the seventeenth day of February, 1869, was tried and convicted of manslaughter, and has appealed to this court.

The first question is presented by a bill of exceptions, which we transcribe at length, to wit:

“Be it remembered that on the trial of the above cause, to wit: on the thirtieth day of March, 1869, the Attorney General, on the part of the State, introduced George L. Richardson, who was sworn and testified in chief substantially as follows, to wit: witness knew the deceased and the accused. The deceased was first, and the accused second mate of the steamboat Governor Allen. Early in the morning of the homicide at the steamboat Governor Allen, the deceased walked up to the accused and remarked to him, ‘I can or intend to run this machine myself, and I have no further use for your services;’ to which the accused replied, ‘all right.’ About fifteen minutes before the homicide the witness conversed with the deceased a few moments. Deceased left witness and crossed the levee in the direction of the city. A few moments before he heard the shot fired, witness started aboard of the boat, met the accused coming off with a colored man behind him, with a carpet bag of the accused. He bid witness good bye and said, ‘I will see you to-morrow.’ At that time he saw the deceased about one hundred yards off, crossing the levee coming towards the boat and as witness reached the boiler deck of the boat he heard a shot fired, and he immediately went back on the wharf, saw the deceased lying down. I went to him, raised him up and found him in a dying condition; and that a colored man handed me a dirk knife, resembling the one in court, that was said was found by the side of the deceased.

“Upon cross examination the said witness testified that the deceased, in the conversation with witness, about fifteen minutes before the homicide, and just before he left witness and crossed the levee in the

direction of the city, asked the witness for a pistol; the witness informed him he had none; he then asked witness where he could get one; witness referred to a person from whom he thought he could obtain one. Deceased asked witness if he had a knife, and remarked that he would sooner depend upon a good knife than a pistol. The counsel then asked this witness what the deceased said he wanted the arms for, and whether the deceased did not say at that time that he intended to kill the accused before he left the boat. To the question and the answering the same the Attorney General objected, for the reason that, before such proof could be made by the defendant, it must be shown that the threat made and the use he intended to make of the weapons he called on witness to obtain, must first be shown had been communicated to the accused before the homicide took place. Which objection of the Attorney General the court sustained, and refused the question and answer. To this opinion of the court in refusing the question and answer the defendant by his counsel excepts, for the reason that the conversation with the witness by deceased was but a short time before the homicide was committed—fifteen minutes as witness stated, and was therefore admissible as a part of the *res gestæ*, going to explain the motives and subsequent acts of the deceased, and upon the further ground that the testimony was important for the defense, if answered in the affirmative, to show the motives and intentions of the deceased towards the accused, and was a part of the circumstances of the case to explain the motives and intentions of the deceased towards the accused."

The evidence sought to be introduced is hearsay, and if admissible, must come within the exceptions to the general rule excluding hearsay evidence.

The defendant contends—*first*, that it is a part of the *res gestæ*, and therefore within the exceptions—and *secondly*, that it tends to establish the design and intention of the deceased to kill the defendant.

First—"To be a part of the *res gestæ*, the declarations must have been made at the time of the act done which they are supposed to characterize, and well calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as obviously to constitute one transaction." 3 Phil. on Ev. p. 585; N. 444.

The facts stated in the bill of exceptions do not bring the proposed evidence within this definition. The declarations of the deceased to the witness were not made at the time of the homicide, the *res gestæ* of which they are supposed to characterize, and no facts are stated as occurring at the time of the killing, the nature and quality of which they are intended to explain and with which they so harmonize as obviously to constitute one transaction. Nor is any connection shown between the interview, early in the morning, when the defendant was

informed that his services were no longer needed, and the subsequent killing, so as to make them (the interview and the killing) and the intervening incidents or the acts of the parties one continuous transaction. What occurred at said interview may be considered a business matter, of which the defendant made no complaint, and no quarrel or grudge between them is shown, nothing to induce the defendant to anticipate or apprehend an attack from the deceased. What the latter may have said to the witness as to his intentions was therefore not a part of what occurred at the time of the killing, the *res gestæ*, and not on that account admissible.

Second—If this be so, it is difficult to see how the excluded evidence is admissible to establish the design and intention of the deceased to kill the defendant, for it would seem that to be admissible for such a purpose, it must be a part of the *res gestæ*. But counsel has cited authority to the effect that, "in the prosecution of a crime so essentially the creature of intent, as murder, everything pertinent should be submitted to the jury upon which they may infer the absence of malice" (19 Wendell, 591); and that "it is admissible for the defendant to show threats or other circumstances of a recent character, which would tend to make a man of his character believe that his life was in danger." Wharton's Homicide, 217.

But to be pertinent, or to make him believe that his life was in danger, the threats or felonious intent of the party killed, expressed only to third persons, must certainly have been communicated and known to the defendant. If not known to him they could have had no influence upon him in committing the homicide, and were therefore irrelevant.

It has been well said that the evidence to show the felonious intent of the party killed "must be gauged by the defendant's opportunities at the time." Wharton's Homicide, p. 215.

In this case the defendant is not shown to have had an opportunity at the time of or prior to the killing, to know that the deceased had made threats to the witness to kill him. The objection was therefore well taken, and the evidence properly excluded.

The next question is that the District Court erred in overruling the motion for a new trial upon the affidavit of newly discovered evidence, as the affidavit and the facts set forth were not contradicted, but in law were taken to be true. We are not referred to any authority, and we know of none to sustain this legal proposition, and as a question of diligence and not an unmixed question of law is involved, the action of the District Court on the motion for a new trial cannot be reviewed on appeal. 11 A. 478.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Mr. Justice TALIAFERRO dissenting:

With some hesitancy I dissent from the opinion of the majority of the court. I do not think that to constitute the menacing language alleged to have been used by the deceased a part of the *res gesta*, it is necessary that it be shown that the accused knew of it before the commission of the homicide. In my view the evidence should be admitted, in order that the jury might, in connection with all the evidence, determine whether it be entitled to any consideration in making up their verdict.

No. 71.—SAMUEL BOYD, Appellant v. CHRISTOPHER CHAFFE.

A contract that cannot be enforced against the principal for want of a lawful cause, cannot be enforced against the vendee of the principal.

Courts of justice will not lend their aid to settle disputes growing out of contracts reprobated by law.

The enforcement of contracts by the courts of this State, the consideration of which was Confederate notes, is prohibited. Constitution, art. 127.

APPEAL from the Eleventh District Court, parish of Claiborne. *Watkins, J. L. B. Watkins*, for plaintiff and appellant, *W. B. Egan*, for defendant and appellee.

WYLY, J. In 1862, William Lackey contracted to sell the plaintiff a lot of cotton on his plantation in Claiborne parish, "to be delivered at Minden landing at any time having twenty days notice." The cotton remained in Lackey's gin house till 1865, when he sold it to the defendant Chaffe, who paid for it and obtained possession thereof.

The consideration of the sale in both instances was Confederate notes.

Plaintiff now sues the defendant for the cotton or its value, alleging that he had conspired with said Lackey to defraud and cheat him out of said cotton, knowing that said Lackey was not the owner thereof.

The evidence does not sustain the charge of fraud and collusion, nor does it establish the fact that Chaffe was aware that plaintiff had purchased the cotton from Lackey.

But even if he had been aware of the contract, that plaintiff had paid Lackey a sum of Confederate money in consideration of which the latter had obligated himself to deliver the cotton at Minden landing at any time, having twenty days notice, that would not have been a legal impediment to the sale.

Knowing that Lackey had received a sum in unlawful currency, in consideration of which he had contracted to deliver the cotton at Minden, did not incapacitate the defendant from making a lawful purchase of the cotton from Lackey. The prior obligation of Lackey to the plaintiff was null. An obligation without a cause, or with a false or unlawful cause is null and void. C. C. 1887, 1889; 17 A. 262; 19 A. 432, 257, 469.

21	476
46	1044
21	476
50	107

Samuel Boyd, Appellant v. Christopher Chaffe.

If Lackey had retained possession of the cotton after contracting to sell it to the plaintiff and afterwards to the defendant, under the Constitution of 1868, and the well settled jurisprudence of this State, neither the plaintiff nor defendant could have enforced his contract with Lackey, because it had an unlawful purpose, being based on Confederate notes.

If plaintiff could not have enforced his contract against Lackey for the cotton, we do not see how he can enforce it against the vendee of Lackey.

We have often held that courts of justice cannot lend their aid to settle disputes founded on contracts reprobated by law. The policy of the law is to leave the parties where they have placed themselves.

Article 127 of the Constitution of 1863, prohibits the courts of this State from enforcing contracts of the character presented in this suit.

It is therefore ordered that the judgment of the court below dismissing plaintiff's demand, be affirmed with costs.

No. 77.—EDWARD NALLE & Co. v. CLEATON HIGGINBOTHAM, Administrator, etc.

21 477
62 1521

The mandate to execute a promissory note for another, must be both express and special. C. C. 2963.

The power is not required to be in writing, but express and special, as distinguished from implied and general.

APPEAL from the Twelfth Judicial District Court, parish of Morehouse. *Crawford, J. Stubbs & Cobb*, for plaintiffs and appellants. *D. C. Morgan*, for defendant and appellee.

HOWE, J. This suit was instituted by plaintiffs against the administrator of the estate of Mrs. Elizabeth Higginbotham, deceased, to recover the amount of a promissory note. The note was made by D. F. Higginbotham, a son of the decedent; but it is claimed by plaintiffs that he was acting as agent of his mother in executing the note—that it was given for supplies furnished for her plantation, and that they are therefore entitled to a judgment for its amount against her administrator.

There was judgment for defendant, and plaintiffs have appealed.

The textual provisions of the Civil Code plainly require that a mandate to execute for another a promissory note should be both express and special. C. C. 2963. It is not required that the power should be in writing, as contended by the counsel of the appellee, but it must be "express" and "special," as distinguished from "implied" and "general." And, therefore, in *Nugent v. Hickey*, 2 Ann. 358, where the defendant was sued upon a note signed by "Walsh, agent for P. Hickey, for Parc Perdu plantation," and it appeared that Walsh held a full power for

Edward Nalle & Co. v. Cleaton Higginbotham, Administrator, etc.,

the purchase of stock and of necessary articles for the use of the plantation, and for the settlement of accounts in relation to the same, that Walsh remained on the plantation for several years, and under the power contracted the debt with the plaintiffs, and closed the account with the note in suit; and the power further provided that Walsh should act for the defendant in all cases in which the latter's interest might be concerned in relation to the plantation, it was held by the court that no liability attached to the defendant by reason of the note given in his name, for Walsh had no authority to bind him in that form.

The case at bar is even stronger for the defendant than the one cited above, for not only was the account of plaintiffs kept with D. F. Higginbotham in his individual name, but the note was taken in settlement in his individual name. Mrs. Higginbotham does not appear in the account or in the note. There is no evidence that she ever gave any legal mandate for its execution or ever in any way acknowledged the liability now sought to be imposed on her succession.

The cases cited by the plaintiff do not seem to conflict with the views we have expressed. In *Reynolds v. Rowley*, 3 R. 201, and 2 Ann. 891, the plaintiffs sued on an account, and it was held that where the agent, who had a special power of attorney by which he was authorized to borrow money for the defendant's plantation, received money from plaintiffs as a loan for the plantations; the defendants were liable, even though the agent had no authority to draw the bills from whose proceeds the loan was made. The question was not one of the authority to execute a note or bill. In *Perrotier v. Cucullu*, 6 La. 587, the bill was drawn by a supercargo in a foreign port; the act seemed to be one of necessity in carrying out the purpose of the agent's appointment, and the court, without passing with directness upon the question of authority, came to the conclusion that the defendant's subsequent agreement to pay the bill out of a particular fund, should that fund be available, amounted to a sanction and ratification of what had been done by his agent.

For the reasons given it is ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 76.—JOSEPH T. SWAN v. ANN L. GAYLE, Administratrix.

The Parish Court is without jurisdiction *ratione materiae* in a suit where a succession is either plaintiff or defendant, and the amount claimed is above five hundred dollars. Constitution, article 87.

The act of the Legislature approved October 6, 1868, No. 141, entitled "An act further defining the jurisdiction of parish courts in succession cases," is unconstitutional, null and void, because the object of the statute is not expressed in the title. Constitution, article 73.

APPEAL from the Parish Court of the parish of Ouachita. *Ray*, Parish Judge. *Robert J. Caldwell*, for plaintiff and appellee. *Isaiah Garrett*, for defendant and appellant.

Joseph T. Swan v. Ann L. Gayle, Administratrix.

LUDELING, C. J. The plaintiff sued the administratrix of the succession of W. H. Gayle in the Parish Court, and he prayed for judgment against the administratrix for upwards of five thousand dollars, and for the recognition of his mortgage on certain property situated in the parish of Ouachita. He also prayed for the sale of the mortgaged property to pay his debts, according to law. The appellant has insisted, in this court, that the Parish Court which tried this case was without jurisdiction *ratione materia*.

If this be true, the judgment rendered by that court is void. C. P., article 92. And we can not give vitality or validity to that judgment, because an "appellate court never can give a judgment which the court *a qua* could not." 5 N. S. 10.

It is our duty, therefore, to notice *ex officio* the want of jurisdiction *ratione materia*.

The question presented is, whether the Parish Court has jurisdiction in a suit wherein a succession is plaintiff or defendant, when the amount in controversy exceeds five hundred dollars? Article eighty-seven of the constitution of 1868, fixing the jurisdiction of the parish courts, declares that they "shall have concurrent jurisdiction with justices of the peace in all cases where the amount in controversy is more than twenty-five dollars and less than one hundred dollars, exclusive of interest. They shall have exclusive *original* jurisdiction in *ordinary suits*, in all cases where the amount in dispute exceeds one hundred dollars, and does not exceed five hundred dollars.

"All successions shall be opened and settled in the parish courts; and *all suits in which a succession is either plaintiff or defendant* may be brought either in the parish or district courts, according to the amount involved," etc.

It appears from the journals of the convention that this article was changed after the convention had once adopted it in a different form. When originally reported by the judiciary committee, the article contained the following sentence: "In *probate matters* they shall have *concurrent* jurisdiction with the district courts in all cases where there exists a contestation or suit, and *the amount in dispute* exceeds five hundred dollars." This was stricken out, and in lieu thereof the following was substituted: "And *all suits in which a succession is either plaintiff or defendant* may be brought either in the parish or district court, according to the amount involved."

As the article originally stood, the plaintiff had the option to file his suit either in the parish or district court, where he had a claim for money *against a succession*, and the amount exceeded five hundred dollars.

As the article was finally adopted, it confers the right on the plaintiffs to sue in the parish court whenever the amount claimed does not exceed five hundred dollars, and a succession is either the plaintiff or defendant. And where the sum demanded exceeds five hundred dollars, and a succession is a party to the suit, the plaintiff must bring the suits in the district court. Thus, it is the *amount alone* which determines

whether the parish or the district court have jurisdiction. That inconveniences and delays in the settlement of successions may result from this change in article eighty-seven of the constitution may be true. But that will not justify us in torturing a meaning out of the words of the article which they cannot fairly be made to bear. The evil can only be remedied by amending the constitution.

It is contended that the General Assembly has given a legislative interpretation to this article of the constitution in act number one hundred and forty-one, adopted in 1863. It is not the province of the General Assembly to interpret the provisions of the constitution for courts. If the object of the law was to explain or interpret the article of the constitution, as the title of the act would indicate—"an act further defining the jurisdiction of the parish courts in succession cases"—then the General Assembly transcended its powers and trenched upon the jurisdiction of the courts, as only legislative powers are vested in the General Assembly. Article fifteen of the Constitution of 1868.

The judicial powers of the government are vested in the courts. Article seventy-three of the constitution of 1863.

If, on the other hand, the object of the law was to confer other jurisdiction on the parish courts, the law is obnoxious to two constitutional objections: First, that the object of the law is not expressed in its title. Article 114, constitution of 1868. Second, that the General Assembly had not the power to *change* the jurisdiction fixed or limited in the constitution—they could not amend the constitution. Article 147, constitution of 1868.

First—Defining the jurisdiction is a very different thing from *extending* or *enlarging* the jurisdiction. As the term is used in the title of the act in question, it means *explaining, interpreting*. Hence the title does not express the object of the law.

*Second—*The clause in article eighty-seven, "and such other jurisdiction as may be conferred on them by law," permitted the General Assembly to grant to parish courts "other jurisdiction" in matters where the constitution had not defined, fixed or limited it; but it did not authorize the Legislature to change or amend the constitution itself. For example, it did not empower the General Assembly to give the parish courts *original* jurisdiction in *ordinary civil suits*, when the amount exceeded five hundred dollars, or to try capital cases, or to give them appellate jurisdiction from the district courts. We are constrained, therefore, to declare the act number 141 of the General Assembly of the State of Louisiana, adopted October 6, 1868, entitled "An act further defining the jurisdiction of the parish courts in succession cases," unconstitutional, and therefore null and void.

In this case the amount in controversy exceeds five hundred dollars, and the parish court was without jurisdiction to try it *ratione materia*.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be avoided and annulled. It is further ordered that the suit be dismissed, and that the plaintiff and appellee pay the costs of both courts.

Rehearing refused.

 Willis Wood, Administrator, v. L. C. Calloway.

No. 67.—WILLIS WOOD, Administrator, v. L. C. CALLOWAY.

The appeal will be dismissed if the bond has not been filed within twelve months from the date of the order. Every act required by law to perfect an appeal when taken, must be performed within the delay allowed by law for taking the appeal. 17 An. 228; 20 An. 236.

APPEAL from the Eleventh Judicial District Court, parish of Union. *Watkins, J. A. B. George*, for plaintiff and appellee. *John L. Barrett, Stubbs & Cobb*, for defendant and appellant.

TALIAFERRO, J. There is a motion to dismiss this appeal on the ground that the appeal bond was not filed within twelve months from the time of the rendition of the judgment appealed from. The judgment was rendered on the ninth of October, 1866, and no appeal bond was filed until the seventh July, 1869, more than two years and a half from the date of the judgment. The motion must prevail.

Every act required by law to perfect an appeal when taken, must be performed within the delay allowed for taking the appeal. 7 Rob. 60; 3 La. 77; 2 La. 323; 17 An. 233; 20 An. 236.

It is therefore ordered that this appeal be dismissed at costs of appellant.

 No. 54.—J. T. SWAN v. H. M. BRY, Clerk.

An order issued by the Parish Judge, directing the clerk of the District Court to transfer to the Parish Court the record of a suit, is in the nature of a proceeding by mandamus, and no appeal will lie from such order without showing an adverse interest above five hundred dollars. The Supreme Court will notice, of their own motion, their want of jurisdiction.

APPEAL from the Parish Court of the parish of Ouachita. *Ray*, Parish Judge. *Robert J. Caldwell*, for plaintiff and appellee. *Isaiah Garrett*, for defendant and appellant.

HOWELL, J. This is a proceeding to compel the defendant, H. M. Bry, clerk of the District Court and *ex officio* clerk of the Parish Court of the parish of Ouachita, to place on the docket of the said Parish Court the suit of Joseph T. Swan v. Ann L. Gayle, administratrix of William H. Gayle, number 771, on the docket of the said District Court for the said parish. After answer filed and trial upon the issue made, judgment was rendered making the rule absolute, and ordering the defendant, H. M. Bry, clerk of the District Court of the parish of Ouachita, to place the said suit on the docket of the Parish Court, to be proceeded in and determined according to law. From this order or decree the defendant took a devolutive appeal, and Mrs. Gayle, administratrix, the defendant in the suit transferred, upon alleging that the said order will cause irreparable injury to her, the succession and creditors thereof, obtained a suspensive appeal.

This proceeding is in the nature of a mandamus, and there is nothing to show that the interest of either party in the matter in dispute

exceeds five hundred dollars, and we are therefore without jurisdiction. The fact that the matter in dispute in the suit which is to be transferred exceeds that sum, does not fix the amount in this. There is no pretension that the defendant will be responsible for the amount of said suit, if he fails or refuses to transfer, and we have no intimation what damage may result to either party by the determination of this suit. The difficulty is not removed by the appeal taken by Mrs. Gayle, the administratrix, as the transfer being illegal cannot affect her rights.

We notice, of our own motion, our want of jurisdiction.

It is therefore ordered that the appeals herein be dismissed at the costs of the appellant.

NO. 56.—STATE OF LOUISIANA v. JOHN J. KREIDER.

21 482
123 861

The plea of *lis pendens* will not be maintained where it is shown that a suit by mandamus has been brought in the name of the State on the relation of a claimant for office, and is still pending, and another suit has been brought in the name of the State by the District Attorney joining the same claimant for office as in the mandamus suit under the acts of the Legislature of 1868, numbered fifty-eight and one hundred and fifty-six, providing a remedy against usurpation and intrusion into office. In the mandamus suit the State is merely a nominal party, and in the suit brought under these acts of the Legislature the State is the actual real party in interest wherein the right to hold the office is the principal subject of inquiry. Want of identity of parties and not having the same objects in view operates as a bar to the plea.

The thirteenth section of the act of September 14, 1868, repealing the charter of the city of Jefferson, approved March 8, 1867, did not abolish the offices of the corporation. This clause only repealed the old charter in so far as its provisions were not incorporated in the new charter.

The failure to hold an election for municipal officers of the city of Jefferson on the first Monday of January, 1869, as provided in section three of the amended charter, adopted September 14, 1868, did not vacate the offices which were filled by election under the charter of 1867.

The appointment to an office by the Governor is void if there was no vacancy at the time the appointment was made.

APPEAL from the Second Judicial District Court, parish of Jefferson. *Pardee, J. Z. McKay*, District Attorney, *Lacey & Butler, J. Hawkins* and *L. A. Sheldon*, for plaintiff and appellee. *A. N. & H. N. Ogden, Fellowes & Mills* and *Cazabat & Scott*, for defendant and appellant.

TALIAFERRO, J. This suit is brought under the act of the Legislature approved October 15, A. D. 1868, for "providing a remedy against usurpation, intrusion into, or the unlawful holding or exercising a public office in this State." Under the act of the Legislature of the eighth of March, 1867, entitled "an act incorporating the city of Jefferson," the defendant was elected Mayor of the city and was discharging the duties of that office when the Legislature passed the act approved by the Governor on the fourteenth of September, 1868, entitled "an act for revising and amending the charter of the city of Jefferson." The third section of that act required an election to be

held on the first Monday of January, 1869, and every two years thereafter for Mayor, Treasurer, Controller and Aldermen, the several officers aforesaid to enter upon the discharge of the duties of their respective offices on the third Monday following their election. The fourth section of that act provides "that the Governor shall, upon the passage of this act, remove the present board of aldermen and other officers of said city and appoint the Mayor, Treasurer, Controller and Aldermen until the aforesaid officers shall have been elected and qualified as in accordance with section three." The Governor did not upon the passage of the act revising and amending the charter of the City of Jefferson remove and appoint as provided for according to section four, but permitted matters to remain in *statu quo* until January, 1869, at which time, as provided by the amendatory act of 1868, an election was to be held. No election however was held at the time fixed nor has an election been held since. There being no election held the Governor proceeded to appoint and commission F. J. Leche Mayor of the city, as in case of a vacancy in the office. Kreider, the defendant, refusing to yield the office to Leche and to turn over to him the paraphernalia appertaining to the office, Leche applied to the District Judge of the district for a writ of mandamus requiring Kreider to recognize him as Mayor of the city of Jefferson and to deliver to him the books, records, personal property, etc., belonging to the office, or show cause to the contrary at the time and place fixed by order of the Judge.

On the trial the judge dismissed the demand of Leche to be recognized Mayor on the ground that upon the application for a writ of mandamus the right to an office could not be inquired into, but decided that the proceeding so far as it aimed to place Leche in possession of the appliances of the office was well taken and to that extent the rule was made absolute and a peremptory writ of mandamus was ordered to issue.

From the judgment thus rendered Kreider took a suspensive appeal which is now pending before this court. At this stage of the proceedings the present action was instituted by the plaintiff under the acts of the Legislature passed in the year 1863, numbered fifty-eight and one hundred and fifty-six, providing a remedy against usurpation and intrusion into office.

Kreider excepted upon the following grounds :

First—*Lis pendens* relying upon the proceedings for a mandamus to sustain that plea.

Second—That the right to a municipal office cannot be tested under the usurpation and intrusion acts.

The judge *a quo* having overruled the exception and rendered judgment upon the merits, declaring Leche to be entitled to the office of Mayor, the defendant appealed.

We will first examine the plea of *lis pendens*. In the mandamus case the controversy is one simply between individuals, although nominally carried on in the name of the State on the part of the complainant. In the other case under what is usually termed the intrusion act it is clear the Legislature intended to remedy an evil prevailing to no small extent, that of the frequent altercations arising from conflicting pretensions to the right of holding office. The grave maxim *interest Republicae ut set finis litium* seems to be at the foundation of this litigation. Hence the State itself takes the initiative, and in the name of the people of the State, the Attorney General is authorized, even upon his own information, to bring actions in the cases specified in the act. It is intended that the State shall be the proper party in interest, to the end that there shall be no interruption or suspension of the functions of the public officers, that delays in the administration of justice shall be prevented and that the duties of the public functionaries shall be regularly and without interruption performed. In all actions brought in contemplation of this act the name of the complaining party if there be one, is joined with that of the prominent plaintiff the people of the State, but the interests of such party in actions brought under this act are deemed of secondary importance. Hence from want of identity of parties in the two cases the plea of *lis pendens* fails. The State in the one case is the actual real party; in the other merely a nominal party.

The objects of the suits were not the same. In the mandamus suit we sustained the views of the defendants, who then contended that the question of office was not involved in that suit, and we refused to permit it to be tried by preference.

We think the exception was properly overruled.

To ascertain whether the Governor had the right to appoint the relator to the office he claims, it is necessary to determine whether the several offices under the act of 1867 were vacant, and to decide this question we must examine the act of the General Assembly approved fourteenth September, 1863, entitled "an act revising and amending the charter of the City of Jefferson." This act, as its title imports, was intended to *revise and amend* the former charter. Sections one and two are the same in both acts. The only substantial change in section three is as to the time when the Mayor, Aldermen, Treasurer and Controller shall be elected. There is nothing in this section which abolishes or changes the offices themselves. Section four in the new charter expressly recognizes the existence and continuance of the offices, for it provides that the Governor "shall *remove* the present Board of Aldermen and other officers of said city and appoint the Mayor, Treasurer, Controller and Aldermen until the aforesaid officers shall have been elected and qualified in accordance with section three." It is evident the Legislature did not contemplate abolishing the offices, but they simply provided for the removal of the present incumbents

and the appointment of their successors to the offices. In section three they changed the time for holding future elections of officers. Did the thirteenth section repealing the act approved March 8, 1867, entitled "an act incorporating the City of Jefferson" abolish the offices? We think it plain that this clause was only intended to repeal the old charter in so far as its provisions were not incorporated in the new charter. It cannot be supposed that the Legislature intended to declare offices abolished which they had in preceding sections of the same act recognized as existing and had provided for filling.

The offices then not being abolished there were no vacancies. The term of office for which the Mayor, Aldermen, Treasurer and Controller were elected under the charter of 1867 had not expired at the time the appointments were made by the Governor in January, 1869, for the incumbents were entitled to hold their offices until the expiration of the term for which they were elected, and this term extended to a period beyond the time fixed by the new act for the election and induction into office of their successors. Therefore the failure to hold an election on the first Monday of January, 1869, did not vacate the offices and consequently there was no room for appointments. The section four contains the only authority found in the act authorizing the Governor to make appointments. It is nowhere provided in the act that the Governor shall make appointments in case of the failure of an election at any of the stated periods. The section four directs the Governor, unqualifiedly, to remove the Mayor, Aldermen and other officers of the city upon the passage of the act, and appoint others. This authority, of very questionable validity, to say the least of it, the Governor did not exercise, deeming, as we may suppose, that the Legislature had in this instance transcended its proper powers. He only made the appointments after the failure to hold the election on the first Monday of January, 1869, on the ground, as we imagine, of there being vacancies. In our view of the two acts vacancies had not arisen, and we therefore conclude that the appointment of the relator to the office of Mayor of the City of Jefferson is null and without effect.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that this suit be dismissed at the costs of the relator.

Mr. Justice Howe took no part in this decision.

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46	633
21	486
47	14

No. 49.—JOHN H. RANDOLPH v. The Widow and Heirs of JOHN L. CHAPMAN.

The holder of promissory notes secured by mortgage on real estate, importing a confession of judgment may proceed *in rem* after the mortgagee has died, to foreclose the mortgage without provoking the appointment of an administrator to represent the succession.

Where the act of mortgage imports a confession of judgment, and no partition of the estate has been made among the heirs, the mortgage creditor may seize and sell the hypothecated property, as if the original debtor were still alive.

If the widow and heirs of the deceased husband whose property is specially mortgaged, be non residents, the mortgage creditor in a suit against the mortgaged property, may provoke the appointment of a curator *ad hoc* to represent them.

APPEAL from the Twelfth District Court, parish of Catahoula. Crawford, J. Mayo & Spencer for plaintiff and appellant, G. S. Mayo curator *ad hoc* for appellees.

LUDELING, C. J. This suit was instituted to enforce the payment of certain promissory notes, executed by John L. Chapman. The notes were secured by special mortgage on lands situated in the parish of Catahoula. The plaintiff alleging that John L. Chapman was dead, and that his widow and heirs were absentees, prayed that a curator *ad hoc* be appointed to represent them in the proceedings, and he prayed for the sale of the mortgaged property to satisfy his debt.

A curator *ad hoc* was appointed and he filed an exception alleging that the heirs, some of whom are minors, have not accepted the succession, without the benefit of inventory; that the widow has the right to renounce the community; and that the curator *ad hoc* is without power to stand in judgment. He prays that an administrator be appointed to represent the succession.

This exception was sustained by the District Judge, and the suit was dismissed.

We think there is error in the judgment. The plaintiff had the right to proceed *in rem* to foreclose his mortgage, without provoking the appointment of an administrator to administer the succession. If the act import a confession of judgment, and there have been no partition of the estate among the heirs, "the creditor shall be entitled to seize and sell the hypothecated property, *as if the original debtor were still alive.*" C. P. art. 66; 1 An. 204, Boguille, Administrator, v. Faille: 2 An. 916; 12 An. 551, 591. The case of the State v. Leckie, 14 An. 641 relied on by defendants, is not in point. In that case the proceedings were not *in rem*.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, that the exception filed in the suit be overruled, and that this case be remanded to be proceeded with according to law, and that the appellees pay the costs of appeal.

No. 74.—Succession of W. H. GALE, on Opposition to Provisional Account of Administratrix.

Where the creditors of a succession are litigating their rights contradictorily with each other and the value of the succession exceeds five hundred dollars, an appeal will lie to the Supreme Court, although the claim of each creditor may not amount to that sum.

The holder of a claim against a succession approved by the administratrix is not likened to the holder of a note payable to bearer, and he is not dispensed from proof of ownership when denied by other creditors.

The privilege of the vendor who has delivered personal property is inferior to that of a lessor. No privilege exists on movables for the payment of State and parish taxes.

Where the fund produced by the sale of the movables of a succession has been exhausted by the special privileges, the immovables or such portion as may be necessary must be sold to pay the general privileges, to which time the settlement of the rank of the general privilege creditors must be postponed.

A PPEAL from the Parish Court of Ouachita. *Kay*, Parish Judge. *John Ray*, for Mrs. Gayle, administratrix, appellee. *R. W. Richardson*, for Schlessinger and Kennedy, opponents. *Garrett & Garrett*, for W. T. Watkins, opponent. *Richardson & McHenry*, for Daniel T. Head, opponent, appellants.

HOWE, J. The funds which are sought to be distributed by this account result from the sale of crops raised upon plantations hired by the deceased, and working animals, implements and other property attached to such plantations.

The inventory of the property of the succession shows that there belongs to it immovable property of the estimated value of \$5000. The record shows that the movables sold as above stated have not produced enough to pay the claims which are specially privileged thereon.

In filing this account, however, the administratrix proposes to pay the *general* privileges by preference from these proceeds of the movables. It is evident that such a course would be an injury to the creditors who have special privileges thereon, reducing their *pro rata* privileged shares, and increasing that portion of their claims which would thus become merely ordinary claims on the rest of the succession funds. At the same time it would be improper to pay over at this time all these proceeds to the creditors specially privileged thereon, and thus leave the general privileges to the chances of a sale in the future of the immovables, which might not produce enough to pay them in full. Article 3223 of Code provides that if the movables of the debtor by reason of the special privileges affecting them, or for any other cause, are not sufficient to discharge the debts having a privilege upon the whole movable property, the balance must be raised on the immovables. To such a case as the one before us we are of opinion that the principle of this article may be properly applied in such a manner as to fully secure the rights both of those who have special, and those who have general, privileges. For this purpose since the fund produced by the movables is exhausted by the special privileges, the immovables or such portion

as may be necessary should be sold, and then, and not till then, can the legal rights of the parties be justly determined. For this purpose the cause must be remanded.

Before the case takes this course we may dispose of some questions raised by the record which ought to be determined.

The administratrix has moved to dismiss the appeals of the opponents, Head and Atkins, on the ground that the matter in dispute in each respectively does not exceed the sum of \$500. The motion must be denied, it being well settled that where the creditors of a succession are litigating their rights contradictorily with each other and the value of the succession exceeds five hundred dollars, an appeal will lie to the Supreme Court, though the claim of each creditor may not amount to that sum. 3 Rob. p. 6.

The claim of Head, however, was properly dismissed by the court below, for he did not prove his ownership of the debt. He claimed a privilege for supplies furnished by the steamers Vicksburg and Grey Eagle, but did not show any interest in himself in either the boats or the supplies. The point urged by his counsel that the claim was approved by the administratrix, and is therefore payable to *bearer*, is not sound. The "bearer" of such a claim as mentioned in Code of Practice, article 984, cannot be likened to the holder of a note payable to "bearer."

The claim of Atkins was, we think, correctly disposed of by the court below. As a vendor who had delivered the property sold, he must be postponed to the lessor, and we cannot perceive that the fact that one of the mules sold was removed from one plantation to another has changed the merits of the claims for privilege. The animal was at all times on a plantation hired by the decedent, and subject to a lessor's privilege.

The court also properly rejected from the list of general privileges the items for State and parish taxes. Such a privilege is not established by law.

We are of opinion that the court properly allowed the claims of S. H. Kennedy & Co. and F. S. & F. G. Schlessinger as a privilege for the full amount. The supplies they furnished appear to have been necessary under the new system of labor. They are not like the bills for "cigars, anisette, and ice in large quantities," which were repudiated by the decision in 6 Ann. p. 668. Nor can we perceive that the fact that some of the supplies were paid out to the laborers on account of their wages can impair the privilege on the crop. The supplies are still furnished to the working of the place, they contribute directly to the making of the crop, and the lessors can hardly complain if, by the fact that the laborers have received them on account of their wages, the superior claims of the latter have been discharged.

But the supplies furnished by the Schlessingers seem to have a privilege on the crop of the Lamy place as well as the McGuire plantation.

In remanding the case an opportunity should be given to fix the amounts bearing on each place respectively. The supplies were furnished to Gale, and if part of them were used on the Lamy place, equity requires that the amount thus used should be privileged on the crop there produced, and the crop of the McGuire place relieved to this extent.

The court did not err in ordering that the lessors be first paid so far as possible from the proceeds of the movables other than the crops. They have a privilege on those movables, and the furnishers of supplies have none. The privileges on the crops are concurrent. The method then adopted by the judgment is correct, for while it does not injure the right of the lessors it materially benefits the furnishers of supplies whom the law designs so far as possible to protect.

For the reasons given it is ordered and adjudged that the judgment appealed from be affirmed in the following particulars:

So far as it dismisses the oppositions of A. L. Swan and D. F. Head, but without prejudice to the right of the said D. F. Head to establish his claim by further proceedings in the case. So far as it disallows the claim of Atkins to a vendor's privilege. So far as it allows the claims of S. H. Kennedy & Co. as furnishers of supplies for \$7281 31, with interest at eight per cent. per annum on \$6000 from December 1, 1867, as a privilege on the crops of the Stevens place. So far as it allows the claims of F. S. & F. G. Schlessinger for \$5416 21, with eight per cent. per annum interest from November 25, 1867, as a privileged claim for supplies furnished. So far as it rejects from the list of general privileges the claims for taxes; and so far as it requires the lessors to exhaust the proceeds of the movables, on which they have a privilege before taking their *pro rata* share of the crops.

It is further ordered that in other respects the said judgment be avoided and reversed, and the cause remanded to be proceeded with according to law in conformity with the views hereinbefore expressed. The costs of the appeal will be paid by the appellants, Stevens, Atkins and Head.

Rehearing refused.

ON OPPOSITION.

In this case the court of its own motion will amend the decree heretofore rendered in respect to the claim of the opponent Atkins, and the costs of the appeal.

It is therefore ordered:

First—That the right of the opponent Atkins, to establish in this cause as remanded any privilege he may have as vendor be reversed; and,

Second—That the costs of the appeal be borne by the succession.

No. 79.—THE STATE OF LOUISIANA ex rel. R. C. DOWNES v. E. B. TOWNE.

Section seven of act number thirty-nine of 1868, entitled "an act to ascertain the eligibility of persons elected or appointed to office and to declare offices vacant," etc., is unconstitutional and void.

A judge of a court or other constitutional officer of the State may be removed from office by impeachment, by address of the Legislature, or by proceedings under the intrusion act, if it be judicially ascertained that he is disqualified by the constitution of this State or the United States. He cannot be removed from office by an act of the Legislature, nor has the Legislature the power to pass an act authorizing or instructing the Governor to declare an office vacant which is created by the constitution.

The appointment and commissioning by the Governor of a party to an office which has been legally filled, without the vacancy being first declared according to law, is an absolute nullity.

APPEAL from the Thirteenth Judicial District Court, parish of Madison. *Hough, J. Gray & Egan*, for relator, appellee. *Stubbs & Cobb*, for defendant and appellant.

WYLY, J. At the April elections of 1868, the relator, Richard Charles Downes, was elected parish judge of the parish of Madison, and received his certificate of election on first July, 1868, from R. C. Buchanan, then commanding the Fifth Military District. On fourteenth July, 1868, he received his commission from the Governor of this State, and on the same day took the oath of office prescribed by the Constitution of 1868, and entered on the duties of his office.

On twenty-fourth April, 1869, the defendant, E. B. Towne, was appointed by the Governor and commissioned to the same office, then administered by the relator, Downes, taking the oath required by the constitution and laws. He also attempted to discharge the duties of the office of parish judge, when the relator, R. C. Downes, and the district attorney instituted this proceeding against him under the act of eighth September, 1868, amended by act fifteenth October, of the same year, providing a remedy against usurpation, intrusion into, or the *unlawful holding* or exercising a public office or franchise in the State. (Acts of 1863, p. 71 and 199.)

The defendant, E. B. Towne, denied that he had usurped, intruded into or unlawfully held the office of parish judge, but claimed to exercise the functions of said office by virtue of his appointment and commission from the Governor, under the seal of the State. He charged that the relator, Richard Charles Downes, is himself a usurper, intruder, and unlawfully holds the office of parish judge because he failed to comply with the provisions of act number thirty-nine, commonly known as the "Eligibility Act," passed in September, 1868, which prescribes an oath to test the eligibility of those elected or appointed to office or already in office. The seventh section of said act provides "that in case commissions have been issued to any person or persons elected or appointed to office before the passage of this act, or if any person has been sworn in, or entered on the discharge of the duties of any office which does not require a commission, all such persons shall take the oath required by section three of this act,

The State of Louisiana ex rel. R. C. Downes v. E. B. Towne.

and file the same in the office of the Secretary of State *within thirty days* after the promulgation of this act, and in the event of their failing to do so, the Governor shall declare such persons ineligible to office and their offices vacant, and the offices shall be filled as prescribed by the constitution and laws of this State." Act 1868 p. 46. The defendant alleged that the relator, Downes, failed to take the oath and file it in the office of the Secretary of State, as required by sections three and seven, and that the office became thereby vacant and he was duly appointed thereto.

He also alleged that Downes is precluded from holding said office by the fourteenth amendment to the constitution of the United States, he having been parish judge and member of the State Legislature prior to the rebellion and afterwards aided and assisted therein.

The court below gave judgment in favor of the relator, quieting him in the exercise and possession of the office of parish judge of the parish of Madison, and decreeing the appointment of the defendant, E. B. Towne, to be void, and excluding him from said office.

The defendant has appealed.

The relator contends that he took the oath of eligibility within the thirty days, but did not file it in the office of the Secretary of State—that the provisions of said act requiring him to do so is unconstitutional. He also contends that he is not disqualified from holding office by the fourteenth amendment of the constitution of the United States, never having aided in the rebellion.

The validity of the appointment of Towne depends on the fact whether there was a vacancy in the office of parish judge of the parish of Madison. If there was no vacancy there could be no valid appointment.

Downes was duly elected, commissioned and qualified, and was performing the duties of the office at the time and before the passage of the Eligibility Act, and also when the defendant, Towne, was appointed by the Governor.

Holding a constitutional office he could be removed by impeachment or address of the Legislature, or by proceedings under the act commonly known as the "Intrusion Act," if it should be judicially ascertained that he is disqualified by the constitution of this State or of the United States.

Until it be determined by a judicial proceeding contradictorily with him that he is disqualified under the fourteenth amendment of the constitution there is no vacancy. If he be not disqualified under the paramount law of the land to hold the office he cannot be removed in any other manner than that indicated in the constitution. His disqualification under the fourteenth amendment can only be determined judicially. The Legislature cannot authorize the Chief Magistrate of the State to decide the question.

To decide whether the relator, Downes, is disqualified or not to hold office under the fourteenth amendment of the constitution of the United States, is purely a judicial question. The seventy-third article of the constitution provides that "the judicial power shall be vested in a Supreme Court, in District Courts, in Parish Courts and in Justices of the Peace." We are of the opinion that the Governor could not legally and constitutionally appoint the defendant, E. B. Towne, to the office of parish judge until the incumbent, Richard Charles Downes, was removed by impeachment or address of the Legislature, or until his disqualification was determined by the court.

The evidence in this case fails to establish conclusively that Downes is disqualified under the fourteenth amendment of the constitution of the United States. Failure to take the oath testing his eligibility and to file it in the office of the Secretary of State in the time limited in act number thirty-nine did not *ipso facto* destitute him of office. It was not in the power of the Legislature to legislate him out of office or to diminish or increase his term of office as fixed in the constitution. They could not authorize the Governor to deem his office vacant on failing to file the test oath, and appoint and commission the defendant, E. B. Towne. We regard the seventh section of the act number thirty-nine, commonly known as the "Eligibility Act," as unconstitutional and void.

It is therefore ordered, adjudged and decreed that the judgment of the court below be affirmed with costs.

No. 25.—JOHN E. BURCH v. AMERICANUS WILLIS.

The character which plaintiff gives to his action by his pleadings must govern in determining the prescription applicable to it.

An action for damages founded on a tort is prescribed by one year.

APPEAL from the District Court, parish of Claiborne. *Watkins, J.*
J. C. Egan, for plaintiff and appellant, *Garrett & Garrett*, for defendant and appellee.

HOWELL, J. In October, 1866, the plaintiff instituted this suit to recover the sum of nine thousand nine hundred and seventy-five dollars, with legal interest from the first of September, 1865, as the value of fifty bales of cotton, which he alleges the defendant "took and appropriated to his own use and benefit, without any right, title or legal claim whatever, in the summer or fall of 1865."

In the answer the defendant admits taking twenty-five bales of cotton, but avers that it was with the approbation and consent of the plaintiff, and by virtue of a purchase of fifty-four bales in 1863, from Mrs. Sarah A. Willis, wife of the plaintiff Burch, who subsequently ratified and approved said sale, which sale included the cotton taken by defendant.

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21	492
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John R. Burch v. Americanus Willis.

After filing the answer defendant filed the plea of prescription of one year, applicable to offenses and quasi offenses, which is pressed upon our consideration as disposing of the case.

Plaintiff's counsel contends that, even if the charge in the petition amounts to a tort, the defendant has given another character to the action and thus taken it out of the application of the plea filed.

Prescription may be pleaded at any stage of the cause, and even in the Supreme Court, and if applicable to the demand to which it is opposed must be sustained.

The character which the plaintiff gives to his action by his pleadings must govern in determining the prescription applicable to it. 12 A. 358, 359; 13 A. 609.

That the charge in the petition in this case constitutes a tort there can be little doubt. The defendant is charged with having taken and appropriated to his own use the property of plaintiff without right, title or legal claim whatever. It was therefore a wrong, an offense. It was the taking and appropriating plaintiff's property without his consent, which caused him damage to the amount of the value of the property, and this amount as fixed by him is claimed in this suit; and as the evidence shows that the act complained of was committed more than one year prior to the institution of this suit, the prescription pleaded is applicable and must be sustained.

It is therefore ordered that the judgment appealed from be affirmed with costs.

**NO. 68.—LITTLEBURY OVERBY v. HEZEKIAH OVERBY, Administrator.
MARY E. OVERBY, Tutrix, Intervenor.**

Contracts entered into between belligerent enemies are absolutely null.

In the late civil war between the United States and the (so called) Confederate States, every individual within the military lines of the one, was a belligerent with reference to the other, and every contract between two parties, the one residing within the military lines of the United States and the other residing within the Confederate lines is absolutely null and void. 20 An. 251.

The contract of agency is included in the prohibitions established by acts of Congress and the proclamation of the President of the United States interdicting trade and intercourse between citizens of the United States and the insurgents, and is therefore void. 12 U. S. Statutes at large, page 1262. Proclamation of the President of August 16, 1861.

A PPEAL from the Parish Court, parish of Morehouse. *Bussey*, Parish Judge. *S. G. Parsons*, for plaintiff and appellant, *James H. Boatner*, for defendant and appellee.

HOWELL, J. This is an action by a principal against the legal representative of an agent for the delivery of certain cotton or the value thereof, alleged to have been purchased by the agent with the funds of, and for the principal. The tutrix of the minor children of the deceased agent intervened and joined in the defense, which pre-

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sents *first*, by peremptory exception, the legality of the agency, alleging that the contracting parties lived or resided at the time upon opposite sides of hostile military lines, were enemies and incapable of contracting.

It is shown that the plaintiff then resided and still resides in the State of Kentucky, a State within the Federal military lines and not one of the insurgent States, and the deceased in Morehouse parish, State of Louisiana, declared by proper authority to be insurgent territory and actually in the occupation of the insurgent military forces; that plaintiff passed through the respective military lines in February, 1862, came to Morehouse parish, constituted his brother, the deceased, his agent to buy cotton on their joint account and furnished the funds for the purpose.

They were consequently in a technical legal sense enemies, and upon general principals of international law, relating to civil war as well as by the terms of the act of Congress of thirteenth of July, 1861, and the proclamations of the President thereunder, incapable of contracting together or establishing any business relations between themselves. The plaintiff was in Morehouse parish in violation and defiance of the rules and regulations of war, the laws of nations and the special laws of this country, and the specific commerce in which he proposed to engage was specially prohibited. 12 U. S. Statutes at large 1262; Proclamation of President, August 16, 1861; 1 Kent 66, 74, 77; 19 An. 491; 20 A. 241; 18 H. 114.

As said in 20 A. 241, "contracts entered into between belligerent enemies are absolutely null, because they affect eminently the public order; each individual becomes by the very existence of the war the enemy of every other person domiciled within the enemy's territory; they are respectively belligerents, and subject in that respect, to all the consequences and to the operations of the laws of war.

"The theory of the law of nations on this subject is, that there cannot be a war for arms, and peace for commerce and trading, at one and the same time. It would be dangerous for any nation in a state of civil war to permit that degree of intercourse to be carried on which must necessarily result from trading and commerce. It would certainly interfere with the secrecy, certainty and dispatch of military operations, without which any war could not be successfully carried on. 1 Kent's Com. p. 66.

"The proclamation of the President of the United States prohibiting intercourse between parties domiciled within the lines of the belligerents was in pursuance of those well settled principles of law.

"Contracts thus entered into are null and void in their inception and original concoction, and no subsequent events can render them valid. See Howard's U. S. S. C. Rep. 50; Kennet's case, 18 How. p. 114."

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The contract of agency is as much within the operation of these principles as any other contract. It requires the concurrence of two minds, an agreement between two parties in a position to contract; its object must be lawful, and the power conferred must be one which the principal himself has a right to exercise. C. C. 2956.

In this case the plaintiff had no right to exercise the power he attempted to confer—to buy cotton in Morehouse parish, or any of the insurgent States, for it was prohibited; and he could not authorize his brother to do so. The courts cannot interfere in such cases to force settlements. The judgment sustaining the exception is correct.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 65.—W. W. HOWE v. WHITED & GIBBS. SMITH, NEWMAN & Co. and others, Third Opponents and Intervenors.

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A purchaser of property under an order of seizure, who claims the fruits of the sale, is precluded from questioning the validity of the decree ordering the immovables by destination to be sold with the mortgaged property.

A factor or merchant has no privilege on the mules, cattle and implements attached to the plantation, or on the proceeds of the sale thereof, for advances made or supplies furnished to make the crop, nor has the factor any privilege for money advanced to the planter who afterwards applied it to the payment of the laborers for working the crop. By giving the fund this direction by the planter and applying it to the settlement of privilege accounts, the factor does not become subrogated to the privilege. The privilege of the factor does not result from subrogation, but springs directly from the law which gives it.

The factor has a privilege on the crop for advances made, and supplies furnished in aid of its production. Acts of 1867, page 381.

Where the land, immovables by destination, and the growing crop have been sold in block, the value of the crop may be ascertained by proof after the sale has been made, and the privilege of the factor attaches to the proceeds.

A factor having a privilege on a crop of cotton for supplies furnished, does not lose it by becoming the purchaser thereof at sheriff's sale. In such a case the privilege passes from the thing and attaches to the proceeds.

A PPEAL from the Twelfth District Court, parish of Ouachita. *Crawford, J. J. & S. D. McEnery*, for plaintiff W. W. Howe and intervenor S. D. Gridley, appellants. *W. J. Q. Baker*, for Smith, Newman & Co., third opponents, appellees. *John Ray*, for Blanchin & Giraud, intervenors, appellees.

WYLY, J. In July, 1867, plaintiff sued out an order of seizure and sale against the lands of the defendants in the parish of Ouachita, together with the standing crop and the immovables thereon by destination, to wit: The mules, cattle and implements.

On the second November, 1867, the property was sold in block to Blanchin & Giraud for \$8225, who paid over to the sheriff \$1370 thereof, retaining the balance in their hands to discharge the outstanding notes secured concurrently by the same act of mortgage.

The day before the sale Smith, Newman & Co. filed a third opposition, claiming a privilege on standing crop of cotton and the mules,

W. W. Howe v. Whited & Gibbs, Smith, Newman & Co. and others, Third Opponents and Interveners.

cattle and implements seized, and asking to be paid by preference out of the proceeds of the sale thereof, the indebtedness due by the defendants for money and supplies advanced by McCombie & Child, through their agents, Lee Crandall & Co., to them, and which indebtedness they allege to have acquired.

H. A. Parker also on the same day filed an opposition, claiming a preference out of the proceeds for the sum due him for labor as a mechanic.

On the twenty-sixth November, 1867, Blanchin & Giraud filed their petition of intervention, claiming an amount due them for advances and supplies, to be paid by preference out of the proceeds of the sale of the crop, mules, cattle and farming implements.

A. G. Gridley subsequently intervened, claiming the *pro rata* due him as mortgage creditor out of the proceeds of the sale, filing with his petition a certified copy of the judgment of the Fourth District Court of New Orleans, ascertaining and fixing the amount due him as holder of the outstanding notes secured by the same mortgage under which the property was sold.

In answer to the third opponents and intervenors, the defendants, Whited & Gibbs, pleaded the general issue.

On the trial the District Judge dismissed the opposition of Parker, decreed that Smith, Newman & Co., and Blanchin & Giraud be paid by preference out of the cotton and personal property for the amount of cash advanced by them to pay the laborers, and that W. W. Howe and A. G. Gridley, mortgage creditors, be paid *pro rata* out of the proceeds of the sale of the lands, and out of the balance of the proceeds of the sale of the immovables by destination, after paying the opposers, Smith, Newman & Co. and Blanchin & Giraud, for the cash advanced to pay laborers as aforesaid.

From that judgment the mortgage creditors, Howe and Gridley, have appealed. The opposers, Smith, Newman & Co. and Blanchin & Giraud, have also appealed. H. A. Parker, whose demand was dismissed, has not appealed.

The contest is now between Howe and Gridley, the mortgage creditors on the one side, and the privilege creditors, Smith Newman & Co. and Blanchin & Giraud on the other, there being no conflict of interest between the mortgage creditors. There is a conflict of interest, however, between the privilege creditors. The issues, as presented in the pleadings, are over the proceeds of the sale. The validity of the decree and the legality of the sale are not at issue.

Smith, Newman & Co. only claimed a preference on the proceeds of the movables and cotton attached to the plantation, and asked for an order requiring the sheriff to hold the same subject to the action of the court. Blanchin & Giraud being the purchasers, and claiming the fruits of the sale, can not question the legality of the decree ordering the immovables by destination to be sold with the mortgaged premises.

W. W. Howe v. Whited & Gibbs. Smith, Newman & Co. and others, Third Opponents and Interveners.

The defendants, Whited & Gibbs, took no appeal from the order, made no resistance to the sale, although present and although duly made parties thereto.

During the year 1867 the defendants obtained cash and supplies from McCombie & Child, through their agents, Lee Crandle & Co., giving them their mortgage note for \$15,000, to cover a prospective indebtedness for supplies and cash to be furnished from month to month, and also agreeing in the act of mortgage to ship them their crops.

After making considerable advances of money and supplies to the defendants, McCombie & Child failed. Smith, Newman & Co. instituted a suit of attachment against them, seizing their claims against the defendants, and finally became the purchasers thereof.

After the failure of McCombie & Child, Blanchin & Giraud made advances in cash and supplies necessary to complete the crops of the defendants.

The first question to determine is, have the opposers, Smith, Newman & Co. and Blanchin & Giraud, a privilege on the mules, cattle and implements attached to the plantations, or in the proceeds of the sale thereof?

As furnishers of cash supplies they undoubtedly had a privilege on the crops. (Act of 1867, page 351.) Under the act of 1867 amending article 3184 of the Civil Code, the laborers had a privilege on the crops and the movables attached to the plantations of defendants. The opposers then have no privilege upon the personal property for their advances. They claim, however, to be subrogated to the privilege of the laborers, that the money advanced to the defendants was applied by them to the payment of the laborers, and therefore they are legally subrogated to the lien of the latter on the stock and other movables attached to the premises.

To this proposition we can not assent. It matters not what may have been the destination of the funds advanced to the defendants, Whited & Gibbs, no legal subrogation accrued in favor of their factors. The moment the cash was drawn there arose between them and the latter the relation of debtor and creditor. The items and amounts drawn were charged up to the defendants instantly, as appears by the accounts filed in this case. If the money advanced by these factors had been applied by the defendants to the payment of an account for supplies for their plantation, the factors would not have been subrogated to the privilege of those who had furnished the supplies. (Hen. Digest 1250, No. 5.) Even though they advanced money for that express purpose no subrogation would accrue. The factors' lien on the crop does not result from subrogation because the planter has applied the funds to the settlement of privilege accounts; it springs directly from the law giving the privilege for cash advanced in aid of the crop. (Act 1867, page 351.) Hen. Digest 1250, No. 5; 12 A. 41; 13 A. 52. The principle is the same when the planter applies the funds to the

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payment of the privilege claim of the laborers. The factor advancing the funds is not subrogated to the laborer's privilege.

The privilege of the opposers, however, attach to the cotton for the respective amounts advanced by them in aid of the crop. (Acts 1867, page 351.)

The parties having a privilege on the cotton could have caused a separate appraisement before the sale, in order to furnish data upon which to ascertain the amount of the proceeds of the sale thereof. But as proof of the value of the cotton has been made (without objection) since the sale, we think the privilege creditors should receive the amount the cotton was proved to be worth.

The value of the cotton was estimated differently by the witnesses. The defendant, Whited, who raised the crop, testified its value to be from \$1000 to \$1200.. We think this witness had probably the more correct idea of the value of the cotton standing in the field, and we will fix the value at his highest estimate, \$1200.

As there is no contest between the mortgage creditors, Howe and Gridley, we are of opinion, after paying the costs of the sale, all the proceeds in the hands of the sheriff and purchasers (except the \$1200, the value of the cotton), should be paid over *pro rata* to Howe and Gridley in settlement of their prior mortgage on the property sold.

As between the opposers, Smith, Newman & Co. and Blanchin & Giraud, we cannot perceive that either has precedence over the other. From the evidence we are satisfied that they each have a valid claim and privilege on the cotton for the amount demanded—that each having made advances in cash and supplies necessary to make the crop, have a furnisher of supplies' lien thereon; and as the proceeds of the cotton is not sufficient to satisfy both claims, they should be paid *pro rata* out of that fund.

Blanchin & Giraud have not relinquished or waived their privilege by becoming the purchasers, nor were their claims and privilege extinguished by confusion. When the thing was sold the privilege attached to the proceeds. They acquired by the purchase the thing, not the proceeds. So far as the proceeds are concerned, the relation of debtor and creditor does not unite in the purchasers. The waiver or concession of precedence on the crops of the defendants made (by notarial act) by Lee Crandall & Co. in behalf of McCombie & Child in favor of Blanchin & Giraud, on the twenty-second June, 1867, can not give the latter any preference on the cotton over Smith Newman & Co. It was not in the power of Lee Crandall & Co., as agents for McCombie & Child, to make such a covenant at the time, in relation of their principals' claim against the defendants, Whited & Gibbs. The attachment of Smith, Newman & Co. had been previously levied, the parties garnisheed had already answered, and the claim had passed from the control of Lee Crandall & Co., as agents of McCombie & Child.

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When Smith, Newman & Co. obtained their judgment, contradictorily with the curator *ad hoc*, their rights to the claim reverted back to the date the attachment was levied. Their purchase of the claim under their judgment has invested them with complete ownership. No waiver, relinquishment, or transfer of claims by a party after the attachment is levied is valid, if the attachment be followed up with a judgment and sale.

The failure to notify the defendants, Whited & Gibbs, that the claims of McCombie & Child had been attached, did not invalidate the attachment. Notice thereof to Whited & Gibbs would have prevented any settlement or equities from arising between them and McCombie & Child; but they have made no settlement.

Failure to notify the defendants did not authorize Lee Crandall & Co., as agents of McCombie & Child, to enter into the agreement with Blanchin & Giraud to relinquish or waive to the latter the privilege belonging to the claim attached.

The record shows that the purchasers paid into the hands of the sheriff \$1370. Of this \$134 55 was paid for costs of seizure and sale in the District Court, and one thousand dollars was paid to plaintiff by consent. The balance, \$235 45, is now ordered to be paid over to the plaintiff.

The purchase price was \$8225. Deducting from this the costs of seizure and sale and the value of the cotton, \$1200, there remains \$6890 to be divided *pro rata* between the mortgagees, as follows: To the plaintiff \$2250 80, and to the intervenor, Gridley, \$4639 65. Deducting from plaintiff's *pro rata* the sum of \$1000 paid him by consent, and the sum of \$235 45 to come to him from the balance in the sheriff's hands, the purchasers, Blanchin & Giraud, still owe the plaintiff \$1015 35, and to the intervenor, Gridley, \$4639 65. On these sums they owe interest at eight per cent. per annum from the second November, 1867, the day of sale, having had the use of these amounts and the use of the property, on which they were secured by first mortgage. 14 A. 149.

The proceeds of the crop, \$1200, will be divided between Smith, Newman & Co. and Blanchin & Giraud ratably, as follows: To the former \$595; to the latter \$605, which they will retain.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided and reversed. It is further ordered and decreed that the sum of \$235 45, remaining in the hands of the sheriff in this case, be paid over to the plaintiff. That the intervenors and purchasers, Blanchin & Giraud, of the city of New Orleans, pay to the intervenors, Smith, Newman & Co., the sum of \$595, and retain in their own hands \$605. That the said Blanchin & Giraud pay to the plaintiff, William W. Howe, the sum of \$1015 35, balance due him as mortgagee, with eight per cent. interest per annum thereon, from No-

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November 2, 1867, till paid, and to Albert G. Gridley, intervenor herein, the sum of \$4639 65, with eight per cent. per annum interest thereon, from second November, 1867, until paid, with mortgage to secure said sums on the property purchased, as per act passed before William Shannon, notary, eighteenth April, 1866, and if said sums be not paid that execution issue therefor. (20 A. 159.) And that Smith, Newman & Co. and Blanchin & Giraud pay the costs of the appeal, and that the costs of the District Court after the sale and prior to the appeal be paid by the plaintiff and the intervenors, one-fourth by each. (11 A. 260.)

Rehearing refused.

(Mr. Chief Justice Ludeling and Mr. Justice Howe were recused in this case.)

NO. 29.—TABLETON, WHITING & TULLIS v. JAMES A. KENNEDY. Rule on Mrs. M. E. THOMPSON et al.

A party cannot claim the nullity of a judicial sale and the fruits of the sale in one and the same action. 2 An. 684; 3 An. 454.

A peremptory exception may be pleaded as well after default as before.

APPEAL from Eleventh District Court, parish of Jackson. *Watkins, J. Kidd & Smith*, for plaintiffs and appellants. *R. W. & R. Richardson, H. Gray and Hamlett & Stevens*, for defendant and appellee.

WYLY, J. An execution in favor of plaintiffs, issued on the twelve months' bond of the defendant, Kennedy, and D. R. Thompson, his surety, and the land of the latter was seized and sold by the sheriff on sixth October, 1866, to Mrs. M. E. Thompson for the price of fifty dollars over and above all the mortgages mentioned in the mortgage certificate made out by the Recorder of the parish of Jackson. The property was adjudicated to the purchaser, who paid over the fifty dollars and retained the balance of the price bid to satisfy said mortgages. The plaintiffs now sue the sheriff and Mrs. Thompson to compel the former to correct his return, and the latter to pay over in full the amount of her bid or enough thereof to satisfy their judgment, or in default thereof to recover judgment against her for the balance due on their execution, alleging that the mortgages on the certificate were for the most part paid or prescribed, or were not all conventional mortgages; that if it be found that said conventional mortgages be not out of date or prescribed, but properly on the mortgage certificate, then the judicial mortgages at least did not authorize the purchaser to retain a part of the price to satisfy them.

The defendant, M. E. Thompson filed a peremptory exception, on the ground that the petition discloses no cause of action against her, and because the plaintiffs do not show that they have sufficient inter-

Tarleton, Whiting & Tullie v. James A. Kennedy. Sale on Mrs. M. B. Thompson et al.

est in the sale to authorize the court to grant the judgment they ask. Plaintiffs thereupon moved that the exception of the defendant be taken for an answer because made after default had been entered. The court overruling the motion maintained the exception of the defendant. From the judgment dismissing their demand the plaintiffs have appealed.

The question raised by the pleadings is, have the plaintiffs shown a sufficient cause of action against the defendant, Mrs. Thompson? They claim the fruits of the sale, and yet set up such illegalities as would vitiate the sale. If Mrs. Thompson has not complied with her bid, unlawfully detaining the price to satisfy mortgages that have no actual existence, the sale might be annulled. If the mortgages have been paid or prescribed, such should be pleaded specially, and with certainty in an action contradictory with the mortgage creditors.

Without testing the rights of the mortgage creditors by a direct action, they cannot proceed against Mrs. Thompson. She bid fifty dollars over and above the mortgages existing on the property as shown by the mortgage certificate. To require her to pay over the full amount of the price would not release her from the privilege and conventional mortgage creditors, and would, in effect, be requiring her to do what was not embraced in her bid. She only agreed to pay fifty dollars and the mortgages. If this was an illegal bid because there were judicial mortgages, for the payment of which the price could not be detained, the sale might be annulled; but having claimed its fruits the plaintiffs are bound by its terms. 2 A. 634; 3 A. 454.

Plaintiffs urge in their bill of exception that the peremptory exception filed after the default must be taken as an answer, citing as authority *Stilley v. Stilley*, and *Lee v. Perry*, 20 A. 428. They are not in point. A peremptory exception can be pleaded as well after default as before. But whether the peremptory exception be regarded as an answer or exception cannot change the result.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 43.—*N. McSTEAD v. BOYD & BLANKS.*

The burden of proof is on the plaintiff to show an interruption where the note sued on is prescribed on its face, and if none is shown the plea will be maintained.

APPEAL from the District Court, parish of Caldwell. *Crawford, J. Wade H. Hough*, for plaintiff and appellee. *J. & R. Ray*, for defendant and appellant.

HOWELL, J. One of the defendants, Frederick A. Blanks, has appealed from a judgment against him and his codefendant on three promissory notes, due respectively on thirteenth December, 1860, first

N. McStee v. Boyd & Blanks.

January and thirteenth April, 1861, and against which they pleaded the prescription of five years. Citation was served on the appellant on the twenty-second September, 1866, more than five years after the maturity of each note and according to the settled jurisprudence and the law of this State, the plea is well taken. See act fifth March, 1852, p. 90, § 3; *Smith v. Stewart*, 21 A. 75; *Rabel v. Pourcieau*, 20 A. 131.

It is therefore ordered that the judgment herein against Frederick A. Blanks be reversed, that there be judgment in his favor on plaintiff's demand, with costs in both courts.

No. 50.—SUCCESSION OF RICHARD KING.

The Supreme Court has appellate jurisdiction only, and cannot try questions of fact until they have been passed upon by the court below. Constitution, article 74.

APPEAL from the Twelfth District Court of the parish of Caldwell. *Crawford, J. John Ray*, for executor, appellee. *B. W. & B. Richardson*, for the heirs, appellants.

LUDELING, C. J. This is an appeal from a judgment probating the last will and testament of Richard King, deceased, and confirming the appointment of W. H. Hough as executor of the will.

The appellants were not parties to the proceedings in the District Court until after the rendition of the judgment. They allege that they are the heirs at law of the deceased, that the judgment of the District Court is prejudicial to them, and they prayed for an appeal, which was granted.

The appellee has denied in this court that the appellants are the heirs of Richard King. This court has only appellate jurisdiction and cannot try the issue thus presented. Article seventy-four of the Constitution of 1863. The case must be remanded.

It is therefore ordered, adjudged and decreed that the case be remanded to the parish court of the parish of Caldwell with direction to the judge to inquire into the right of the appellants to appeal.

No. 48.—E. W. ELTON, Executor, v. JOHN R. TEMPLE.

Questions of fact not raised on trial in the District Court cannot be examined on appeal. Succession of King, reported above; Constitution, article 74.

APPEAL from the Twelfth District Court of the parish of Morehouse. *Crawford, J. Newton & Hall*, for plaintiff and appellee. *Parsons & Morgan*, for defendant and appellant.

LUDELING, C. J. This appeal was taken by petition from a judgment by default made final on the sixteenth of June, 1866. More than a year having elapsed before the application for the appeal, the defend-

E. W. Elton, Executor, v. John R. Temple.

ant alleged under oath that when the judgment was rendered he resided in the State of Pennsylvania, and that he has continuously resided there since that period.

The appellee has filed a motion to dismiss the appeal, in which it is denied that Temple was a nonresident. This presents a question of fact not raised in the District Court. This court has not original jurisdiction. Article seventy-four of the Constitution of 1868; succession of King, 21 An. 502.

It is therefore ordered that the case be remanded to the court *a quo* with directions to try that issue.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

NATCHITOCHES.

AUGUST, 1869.

PRESENT:

HON. JOHN T. LUDELING, <i>Chief Justice.</i>	
HON. J. G. TALIAFERRO,	}
HON. R. K. HOWELL,	
HON. W. G. WYLY,	
HON. W. W. HOWE,	
	<i>Associate Justices.</i>

21	505
44	49
44	423
21	505
49	181

No. 57.—ELEANOR A. WOODS et al. v. HILLIARD H. LEE et. als.

Where a court has jurisdiction its decree will protect the purchaser at probate sale from all informalities which may have preceded it, in the absence of any charge or proof of fraud. The indorsement on the back of an order of sale by the administrator who makes the sale is admissible in evidence on the trial of a suit to annul the sale. The objection that its genuineness is not proved goes to the effect.

Five years possession of property purchased at probate sale will protect the purchaser against all irregularities and informalities which have been committed by the administrator after the date of the order of sale. Revised Statutes, page 22, § 4.

APPEAL from the District Court, parish of DeSoto. *Cresswell, J. B. L. Hodge*, for plaintiffs and appellants. *J. B. Elam*, for defendants and appellees.

HOWELL, J. This is an action by the heirs of Ezer E. Woods to annul the probate sale of a tract of land in the parish of De Soto made on the twenty-eighth February, 1851, to one Joseph D. Lee, from whom the defendants acquired, on the following grounds:

First—The order of sale is insufficient and void because the clerk had no authority to make it, and because petitioners, who are the

forced heirs of the deceased, were not notified of the application for said order. It is insufficient and void because the day fixed for the sale did not admit of the legal delay required for advertising and was not notified to petitioners.

Second—The said sale was made without any previous notice or citation to petitioners of the application or order therefor.

Third—Said sale was made without the advertisements or notices required by law.

Fourth—The said sale was made on a day different from that mentioned in the order.

Fifth—None of the requirements of law were complied with and said sale was intended to defraud petitioners of their just rights.

Sixth—Said sale was made on a different day from that appointed in the commission to sell.

Seventh—Said sale was made by a person not authorized by the commission or law to sell said property.

Eighth—The terms and conditions of said sale were not in accordance with law.

Ninth—There was no necessity for the sale of said property.

In a supplemental petition the following additional grounds are set out :

Tenth—That the pretended sale was made on a day different from that on which it had been advertised to be made.

Eleventh—That the said land was not bid off by, or adjudicated to the said Joseph D. Lee, as was falsely represented by the act of sale made to him by F. A. Woods, administrator, and by which petitioners were deceived ; but Joseph B. Elam, who was then and there acting as the attorney at law and agent in fact of the administrator, bid off said land and afterwards had the title made by said Woods to said Joseph D. Lee ; that said Joseph D. Lee paid several hundred dollars to the said Elam, as aforesaid, in order to have the title so made—the said Lee well knowing that said sale was illegal, had declined to bid for said land, although he was present at the said pretended sale.

Twelfth—That said land was sold or pretended to be sold for greatly less than its value, and that by said sale petitioners have sustained damage to the amount of \$25,000 ; that it was sold for less than its value, as it was sold on long terms of credit without interest on the price.

The defendants, after pleading the general issue, averred that they acquired title at the probate sale of their ancestor, Joseph D. Lee, who acquired at the succession sale of Ezer E. Woods, deceased, made by F. A. Woods, his administrator, on the twenty-eighth of February, 1851 ; that the sale was made in pursuance of a decree of the District Court of the parish of DeSoto, and a commission issued thereon, and that they are protected by said decree against all antere-

dent nullities and illegalities set up in the petition; that as to the informalities and irregularities alleged to have been committed by the administrator subsequent to the decree they are prohibited by the prescription of five years, which they specially plead; that if the sale was made on a day other than that mentioned in the order or commission, it was because it was necessary, as the sale could not be completed in one day, but was commenced on the day mentioned in the advertisement and continued from day to day until all the property could be sold; they deny that J. B. Elam was the agent of the administrator and aver that if the land was adjudicated to him and he permitted the title to be made to J. D. Lee, there was nothing illegal in it, and plaintiffs were not and could not be injured by it.

On these issues the parties went to trial, and judgment having been rendered sustaining the defense, the plaintiffs appealed.

We find in the record two bills of exceptions taken by the plaintiffs. The first was to the rejection of evidence offered to establish the alleged informalities and irregularities anterior to the decree ordering the sale.

This ruling is fully sustained by that in the succession of John Gurney, 14 A. 622, where it was held that where the court has jurisdiction, its decree protects the purchaser, in the absence of any charge or proof of fraud, and the bill of exceptions does not disclose any purpose of establishing fraud by the evidence offered and rejected. See also 13 L. 431; 11 L. 156.

The order of sale in this case was made by the clerk who was specially authorized thereto by the act of 1850, page 100, and it had the same effect as if made by the judge. See 12 A. 612 and constitution of 1845, article 79.

The second bill was taken to the admission, as evidence, of the indorsement upon the back of the commission to sell, to which the plaintiffs objected because there was no proof of its genuineness or of the correctness of its contents, but it is merely a statement made by a party not under oath; and because it cannot be true if the advertisement was made under the commission, as it states that the commission was received on the twenty-sixth February, which was the day for the sale according to the advertisement. The ruling of the judge was correct that these objections go to the effect rather than the admissibility of the evidence, and that the writing was contemporaneous, at a time unsuspecting, and was the act of an officer of the court.

This return states that the sale was commenced on the twenty-sixth day of February, the day named in the advertisement, and the only evidence to the contrary is the testimony of Womack, who was employed by the administrator to cry the bids and who is too vague and uncertain in his recollection and statements on the trial, in December, 1859, to overcome the written return of the administrator made at the time of the sale, in February, 1851—a period of over eight years. The advertisements were made during the time required, and

Eleanor A. Woods et al. v. Hiltiard H. Lee et als.

the statement in the return of the date on which the commission was received, is fully explained.

There is no evidence to establish fraud in the parties as charged, or to implicate the administrator in an effort to control the adjudication through the instrumentality of an agent. J. B. Elam was the counsel but not attorney in fact of the administrator, and we can see nothing illegal or improper in his conduct on the occasion, and nothing that has caused or tended to cause any injury to the plaintiffs. The adjudication to Elam, as made, divested the title of the succession (C. C. 2586; 13 L. 389; 19 L. 237; 8 R. 454), and his consent is presumed to the substitution of another purchaser. It is not shown that the property was sold greatly below its value. The prescription of five years must protect the purchaser from all other irregularities and informalities alleged to have been committed by the administrator after the date of the *order of sale*. See act of 1834, re-enacted in 1855 (Revised Statutes, p. 22, § 4). He had in the order of the court legal authority to make the sale. The property was sold at the sale so ordered and advertised, and to a party legally capable of purchasing. All mere irregularities and informalities in the execution of the decree or order of sale are cured by the above statute. 14 A. 598; 10 R. 396; 4 R. 26, 201.

A careful examination of the record satisfies us that the defendants are within the equitable rule of our jurisprudence, that "*bona fide* purchasers, who have paid their money upon the faith of judicial proceedings, and have remained in possession for years, are not to be turned out on account of mere informalities at the instance of a party who shows no injury." 3 A. 561; 6 A. 61, 581; 8 A. 503; 12 A. 271; 14 A. 622.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

No. 81.—DANIEL BROWN et al. v. A. V. ROBERTS, Administrator.

An administrator cannot be permitted to resist an application for an order to sell the property of the succession founded on a judgment against the estate, by setting up unliquidated claims in reconvention against the judgment creditor.

A contract of lease without a lawful cause cannot be made the basis of a demand for rent.

A PPEAL from the Tenth Judicial District Court, parish of DeSoto. *Weems, J. T. T. & T. T. Land*, and *Pierson & Levy*, for plaintiffs and appellees, *Elam & Wemple* for defendant and appellant.

LUDELING, C. J. A. V. Roberts, Administrator, instituted a petitory action against the plaintiffs in this suit and obtained a decree declaring the lands claimed to belong to the succession of Samuel and Susan Quarls. This judgment was affirmed on appeal, but the case was remanded with instructions to the District Court to settle and determine the claims of the parties for improvements and revenues. On the twenty-third day of December, 1859, this branch of the case was

Daniel Brown et al. v. A. V. Roberts, Administrator.

tried and decided in the District Court, there was judgment in favor of the defendants, Brown *et al.* for eighteen thousand dollars, with legal interest from the date of the decree. On appeal this judgment was affirmed by the Supreme Court. By the terms of the decree no writ of possession was to be issued for the land, until the judgment for the value of the improvements had been settled. On the fourth of November, 1861, Brown *et al.* applied to the court for an order of sale to sell the land aforesaid to pay their debt. A. V. Roberts, administrator, opposed this order, on the ground that this judgment had been settled in the manner following: that in January, 1860, the administrator leased all the plantation for that year to Daniel Brown, except two hundred acres, which was leased to John F. Hailey, with the consent of Daniel Brown; that Brown was to pay two thousand and sixteen dollars, and Hailey one thousand dollars, and that Brown collected the thousand dollars from Hailey; that Brown continued to occupy the plantation until the twenty-third of November, 1866, without giving any notice of his intention to terminate the lease, and he claims rents from said Brown at the rate of three thousand and sixteen dollars per annum for the time he occupied the plantation, being in the aggregate twenty-one thousand one hundred and twelve dollars.

He further alleged that Brown *et al.* had cut and sold cord wood off the place since the rendition of the judgment in the case of A. V. Roberts, administrator v. Brown *et al.* to the amount of five thousand dollars. That they had removed the fences on the place worth four thousand dollars, that they had removed the gin house, gin stand and press, or by their negligence permitted them to be removed, or let them fall into decay and ruin, and that said property was worth one thousand dollars, and finally that they have committed general waste or permitted damages to be done by their negligence to the extent of two thousand dollars; and he prayed for judgment in reconvention for any excess over the judgment of Daniel Brown *et al.*

The plaintiffs excepted to this mode of proceeding on the ground that the plaintiffs' demand is based on a final judgment, and the sums pleaded in compensation and reconvention are unliquidated, and because the claims are alleged to have accrued after the filing of plaintiffs' petition, and after defendant had been put *in mora* under the judgment in favor of themselves. The judge *a quo* sustained the exception and ordered that the claims set up by Roberts, administrator, be disregarded, except the claim for rents. On the trial there was judgment in favor of Brown *et al.* ordering the sale of the lands before mentioned to pay the judgment in favor of Brown *et al.*, and rejecting the demand for rents. A. V. Roberts, administrator, has appealed.

The ruling of the judge *a quo* sustaining the exception to the pleas in reconvention was correct. It has been repeatedly decided that an

unliquidated claim against the plaintiff in execution will not authorize an injunction to restrain the execution of a writ of *fiery facias*. 5 An. Smith v. Foster, 551; 6 An. Cox v. McIntyre, 471; 14 An. Henford v. Babin, Sheriff, 331.

The same reason exists for not permitting an administrator of a succession to resist an application for an order to sell property of the succession, when the application is based on a judgment which gives the plaintiff a right to be paid by preference out of the property to be sold. We will notice the question whether Brown was responsible for rents for the years 1860, 1861 and following, as the District Court passed on this question. It appears from the record that on the second of January, 1860, Brown and Roberts, administrator, entered into an agreement by which the latter leased to the former the plantation which had been and was the subject of controversy between them. At that time an appeal was pending in the Supreme Court, from a judgment in favor of Brown *et al.* for eighteen thousand dollars, and which judgment maintained Brown *et al.* in the possession of the plantation until the said sum should be paid to them or be deposited in court.

Both parties have testified in this case, and from their testimony it appears that both parties expected that a final decision by the Supreme Court would be made in that case in August, 1860; and that the agreement relative to the lease was made in consequence of such expectation. *In fact*, however, the final decision was not made until April, 1861. Thus, then, it appears, that, under the decision in the case of Roberts, administrator v. Daniel Brown *et al.*, and the law, Brown *et al.* had a right to the possession and occupation of the plantation until the final decision of that suit, and the payment of the amount due them by the succession. C. C. art. 3416.

Therefore, no rent could be due by them until the decree of the court had been complied with by the administrator or the heirs.

It is evident from the evidence in the record that the contract of lease was without a cause.

It was *expected* that the administrator would be entitled to get possession in August, 1860, but the decision was not made until 1861; and up to the present time the representative of the succession has failed to pay the judgment in favor of Brown *et al.*, which alone would give him a right to the possession of the plantation. 3 M. 168, Syndics of Bermudez v. Ibanez.

"The contract is also considered as being without a cause, when the consideration for making it was something which, in contemplation of the parties, was thereafter expected to exist or take place, and which did not take place or exist," etc. C. C. 1891; 17 La. 445; Theriot v. Chaudoir *et al.*, §§ 462 and 464, Story on Contracts.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs of appeal.

No. 82.—Succession of JOHN A. ROSS. Opposition to Homologation of Account.

21	511
44	548
21	511
50	748

Where the clerk of the District Court fails to reduce the testimony to writing and annex it to the record in a suit founded on an opposition to an executor's account, the Supreme Court will remand the cause, with instructions to have the evidence reduced to writing.

APPEAL from the Tenth Judicial District Court, parish of De Soto. *Weems, J. R. J. Bowman*, for executor, appellee. *Elam & Wemple*, for opponents, appellants.

TALIAFERRO, J. The executors of the decedent filed a provisional account of their administration on the twenty-second September, 1866, which it appears was duly advertised for the required period of time, and that no opposition was made to it. The account was homologated on the twelfth of October following. From the judgment homologating the account the Union Bank, represented by its attorney, appealed.

At the August term of this court, 1867, a motion to dismiss this appeal was overruled, and the case continued in order that all the parties in interest might be duly cited. The appellant alleges that the bank is a creditor of the succession for a large amount, and its interests affected injuriously by the judgment appealed from. It is averred that upon the account there are large sums set down as due the children of the deceased in right of their mother, without any evidence being introduced to prove the correctness of the items, or, if introduced, it was not committed to writing. That a part of these claims so allowed are recognized as having privilege on certain movables, and the remainder as secured by legal mortgage on all the lands belonging to the succession. That these claims, without any proof of their correctness or legality, would absorb the estate, and leave nothing for the ordinary creditors.

The appellees rely upon the regularity, as they allege, of the proceedings and the judgment of homologation, without opposition to the account, and refer to articles 1172 and 1173 of the Civil Code. These articles apply in the settlement of successions, but article 1042 of the Code of Practice requires "that the testimony of witnesses in causes before the courts of probate shall be taken in writing and annexed to the record, and a list shall be made of such documents as are produced by the parties, and are not annexed to the record, that they may be read on the appeal." In the case of *Tompkins et uxor v. Benjamin*, tutor, 16 L. R. 197, this court remanded the case for a new trial, because the Judge of Probate failed or neglected to take down the testimony of witnesses on the trial, and the record came up without it. The same course was pursued in the case of *Graham's heirs v. Graham's administrator*, 16 L. page 201. And the views taken by the court in these cases were further confirmed and adopted in 17 La. 115, 3 An. 554, and 4 An. 517. Following the rules thus laid down by these decisions, and believing, moreover, that the ends of justice require it, we deem it proper to remand this case for further proceedings.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed.

It is further ordered that this case be remanded to the court of the first instance, in order that the testimony adduced in support of the various items of the account may be committed to writing, as required by law, and to the end that this court may properly examine and determine the case on appeal.

It is further ordered that the succession pay the costs of this appeal. Rehearing refused.

No. 109.—WILLIAM CROSBY v. JERRY H. TUCKER.

A party having given his promissory note for the price of land purchased, is debarred from setting up that the valuation of the land was estimated in a depreciated or unlawful currency. Nor can he set up that a previous holder was willing to take an unlawful currency in payment of the note.

APPPEAL from the Tenth District Court, parish of DeSoto. *Weems, J. C. M. Pegues*, for plaintiff and appellee. *E. J. Bowman*, for defendant and appellant.

WILLY, J. The defendant appeals from a judgment against him on a promissory note given in part payment for a tract of land in the parish of DeSoto.

First—The defense is that the amount of the sale was fixed in Confederate prices, which was to gold as three to one.

Second—The payee of said note received the first installment for the land in Confederate notes, and agreed to receive the same currency for the note sued on.

The defendant alleged and proved that the plaintiff acquired the note after its maturity. The original consideration thereof can therefore be inquired into.

The note is described in the act of sale as evidencing part of the price of the land; there is no mention either in the note or deed of any agreement to take Confederate money. The consideration is admitted to be the price of the land. We cannot perceive the force of the defense urged. That the original payee and vendor received the first installment from him in Confederate money, or that he, in conversation, expressed a willingness to receive Confederate money in payment of the note, does not taint it with immorality. It is no defense to a note having a lawful consideration that a previous holder was willing to take an unlawful currency in payment thereof.

Nor can the purchaser claim an abatement of his contract because he estimated the property bought in a depreciated and unlawful currency. For a lawful and valuable consideration he bound himself unconditionally to pay *in dollars* the amount expressed in the note sued on, and he can not evade the obligation he has contracted.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Union Bank of Louisiana v. Succession of John A. Ross. A. J. Rugely & Co., Warrantors.

No. 83.—UNION BANK OF LOUISIANA v. SUCCESSION OF JOHN A. ROSS.
A. J. RUGELY & CO., Warrantors.

A third holder of commercial paper before maturity is not compelled to prove that he gave a valid consideration to enable him to recover of the maker, unless it is shown that there is want or failure in the original consideration.

APPEAL from the District Court, parish of DeSoto. *Weems, J. Elam & Wemple*, for plaintiff and appellee. *R. J. Bowman*, for defendant and appellant.

HOWELL, J. This is an action on a promissory note made by the decedent to the order of A. J. Rugely & Co. and by them specially indorsed to the plaintiff. The executors of the maker, besides the general denial, allege that the plaintiff received the note after maturity, and without a legal consideration, having paid Confederate treasury notes for it in discount. They further allege that their testator paid the note to the payees and original holders, who agreed to warrant him against a subsequent payment thereof, and call them in warranty.

J. D. Blair, of the firm of A. J. Rugely & Co., answered the call in warranty, denying plaintiff's title to the note sued on, because acquired with Confederate treasury notes, and alleging that if any payment was made, as set up in the answer, it was made in Confederate notes to Rugely, who was without authority to receive the same, the partnership having been previously dissolved to the knowledge of the maker of the note, and if any right in warranty existed it is against said A. J. Rugely or his representative. No citation was served upon Rugely or his representative. Judgment was rendered in favor of plaintiff for the amount of the note, to be paid in the due course of administration and in favor of the succession over against J. D. Blair in warranty, from which the executors and Blair appealed. The evidence shows that the plaintiff acquired the note from the payees before maturity, and as the original consideration is good, as expressed on the face of the note, the succession of the maker cannot be benefited by showing an invalid consideration, as between the payees and holders. The rights of the holder are ordinarily fixed at the date of the maturity, and no subsequent acts between the *original parties* to the note can affect them. The alleged payment, therefore, after maturity to the payees, who were not the holders and owners, was not an extinguishment of the note. Unless there is want or failure in the original consideration shown, the third holder of commercial paper before maturity is not compelled to prove that he gave a valid consideration in order to recover of the maker, who is bound on the consideration of his own contract. The judgment was properly rendered against the succession in this case.

As to the call in warranty, the payees in receiving the amount of the note from the maker bound themselves in express terms to deliver the

Union Bank of Louisiana v. Succession of John A. Ross. A. J. Bugely & Co., Warrantors.

note, which has not been done; and the evidence is not clear that the payment was made in Confederate treasury notes, as alleged by the warrantor, who must, to be relieved, adduce evidence so complete as to leave nothing to surmise or conjecture. 20 A. 1, 47.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 162.—DANIEL LEE *v.* W. B. TAYLOR, Administrator, etc., et al.

21 514
52 1291

A vendor cannot maintain an action to rescind a sale and retake the property conveyed without returning or tendering to the vendee the portion of the price which he has received.

APPEAL from the District Court, parish of DeSoto. *Jones, J. R. J. Bowman*, for plaintiff and appellee. *C. D. Bullock*, for defendant and appellant.

HOWE, J. This suit was instituted against the administrator of A. J. Taylor, deceased, and against Elizabeth Lane to dissolve for non-payment of the price a sale of a plantation made by plaintiff to A. J. Taylor on the eleventh November, 1858. The price was \$3200, of which \$1000 was paid in cash, and the balance represented by two notes for \$1100 each. One of these notes was paid, and the sum of \$170 50 was paid on account of the other. The latter fell due January 4, 1861, and citation was served in this case January 18, 1867.

The petition alleges that in the year 1864 A. J. Taylor sold the land to Samuel Ivey for Confederate money, and that the latter made a donation thereof to the defendant Elizabeth Lane, who, with her husband was in possession. The defendant Lane, pleaded a general denial except as modified by the admissions of the answer, admitted the sale from Taylor to Ivey, and the donation to herself, denied that the sale from Taylor to Ivey was a nullity, and also pleaded the prescription of five years.

The cause was tried before a jury, who gave a verdict that the sale be rescinded, and judgment was rendered accordingly. The defendant Mrs. Lane, appealed.

The pleadings and the evidence in this case show an attempt upon the part of the plaintiff to dissolve a sale on account of a nonpayment of part of the price without returning or offering to return the much larger portion already paid to him.

This is not permitted by law. "The dissolving condition is that which when accomplished operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed." C. C. 2040. When therefore the vendor seeks to enforce this condition he must place the vendee in the same state in which he was before the sale. The rule that the vendee shall not keep the property without paying the price is no more imperative than the rule that the

Daniel Lee v. W. B. Taylor, Administrator, etc., et al.

vendor shall not retake the land without returning such partial payments as he has received.

It is not established with certainty that the consideration of the sale from Taylor to Ivey was Confederate money. See *Weaver v. Anfoux*, 20 Ann. p. 1. But if such fact were established it is clear that there was delivery to, and possession by, Ivey, and that the contract of sale was fully executed. Constitution, article 149. We do not feel called upon therefore to say that the rights of Mrs. Lane are any less than they would be if her donor had paid lawful money. It is also shown that valuable improvements have been made on the place since the sale by plaintiff.

The view we have taken renders it unnecessary for us to consider the other points in the case.

For the reasons given we must conclude that the verdict and judgment are without foundation.

It is therefore ordered that the judgment appealed from be avoided and reversed, and the verdict of the jury set aside, and that this suit be dismissed at plaintiff's costs as in case of nonsuit.

No. 164.—EDWARD NOBLE v. J. L. LOGAN and others.

When an appeal is taken from a judgment on a joint contract all who were required to be made parties in the court below must be made parties to the appeal, otherwise the appeal will be dismissed.

APPEAL from Tenth District Court, parish of DeSoto. *Levisse, J. Elam & Wemple*, for plaintiff and appellee. *R. J. Bowman*, for defendants and appellants.

WYLY, J. Plaintiff moves to dismiss this appeal because all the joint obligors against whom the judgment was rendered have not been made parties to the appeal.

The appeal was taken on motion by one of the defendants, S. E. Guy, and the bond was given by him only in favor of the plaintiff. The defendants were sued jointly on a contract of lease, and judgment was rendered against them jointly.

This case is not distinguishable from that of *Drew v. Atkinson*, 3 R. 140, and *Duggan v. De Lizardi*, 5 R. 224, where it was held that when an appeal is taken from a judgment on a joint contract all who were required to be made parties below must be made parties to the appeal, otherwise it will be dismissed. Without the appearance of all the joint obligors this court cannot pronounce that judgment which ought to have been rendered in the court below, if we should be of opinion that the court erred. C. C. 2080, 2081.

It is therefore ordered that this appeal be dismissed at appellants' costs.

No. 165.—GEORGALINE HASTINGS v. REBECCA BRANTLEY et als.

A peremptory exception that the petition discloses no cause of action admits, for the purposes of the exception, that all the allegations in the petition are true; and when from the allegations in the petition, if true, the court would be enabled to pronounce judgment thereon, the exception will be overruled.

A PPEAL from the District Court, parish of DeSoto. *Weems, J. R. J. Bowman*, for plaintiff and appellant. *J. B. Elam*, for defendants and appellees.

Howe, J. The plaintiff, alleging herself to be universal legatee of Harris Brantly, deceased, instituted this suit against the executrix, the heirs at law, and Charles E. Doll, agent of Jules Tardos, of New Orleans, and sequestered certain cotton, which she claimed the executrix had caused to be sold through the sheriff of DeSoto on the fourteenth March, 1864. She alleged various causes of nullity of the sale, among others that the pretended price had been paid in Confederate money; and she averred that the cotton had never been delivered, but was still on the plantation of the deceased, and that Doll as agent of Tardos, the pretended vendee at sheriff's sale, was preparing to take it away.

The cotton sequestered was by consent released from seizure, the proceeds to be deposited to await the determination of the suit. The heirs, made defendants, answered, adopting the allegations of the plaintiff, and urging with her the nullity of the sale. The executrix made no answer, and judgment by default was taken against her. The defendant Doll, without answering, made a motion to set aside the writ of sequestration and to dismiss the suit on the following ground: "Because the causes of nullity alleged against the sheriff's sale of the cotton mentioned in plaintiff's petition are insufficient in law to maintain the plaintiff's action against him." Upon this the court gave judgment that the writ of sequestration be set aside and the suit dismissed as to the defendant Doll; and from that judgment the plaintiff and a portion of the heirs have appealed.

The motion is in the nature of a peremptory exception to the petition on the ground that it discloses no cause of action. It raises no question as to the form of plaintiff's action or the propriety of a writ of sequestration in a suit by a legatee against an executrix. It admits for the purposes of the motion the truth of the allegations of the plaintiff's petition.

With this view of the pleadings we are constrained to think that the judgment of the court *a qua* was erroneous. The allegations of the petition being taken as true, we find the sheriff of DeSoto in 1864 selling, or attempting to sell, the cotton to Jules Tardos, of New Orleans; that the consideration of this sale was Confederate money, that the cotton was never delivered to the pretended vendee, but was still on

Georgaline Hastings v. Rebecca Brantley et als.

the plantation of the deceased; and that Doll as agent of Tardos, was at the moment of the institution of the suit attempting to obtain possession of and remove the property. Under such circumstances we must think that the sale was a complete nullity, conferring no rights on Tardos, and that therefore there was a right of action against Doll.

For these reasons it is ordered that the judgment appealed from be avoided and reversed, that the motion made by the defendant Doll to set aside the writ of sequestration and to dismiss the suit be overruled, and that the cause be remanded to be further proceeded with according to law.

No. 163.—A. M. HADEN v. L. PHILLIPS AND R. D. FOSTER.

In a sale of land, slaves and movable property, after the date of the emancipation proclamation, where the evidence shows that a portion of the price has been paid, equal to the value of the land and movables, the law will impute the payment to the land and movables, and the balance of the price, being without consideration, cannot be enforced. *Wainwright v. Bridges*, 19 A. 234; *Posey v. Driggs* 20 An. 197.

APPEAL from the District Court, parish of DeSoto. *Weems, J. Elam & Wemple*, for plaintiff and appellant. *R. J. Bowman*, for defendants and appellees.

HOWELL, J. On the thirteenth day of July, 1863, the plaintiff, A. M. Haden, sold to the defendant, R. D. Foster, a tract of land situated in the parish of DeSoto, and containing four hundred acres more or less, with all the improvements, the stock of cattle, hogs and farming utensils thereon, and fifteen slaves, for the sum of \$20,000, of which, \$2,500 were paid in cash, and for the balance the purchaser executed his three promissory notes for \$5,833 $\frac{33}{4}$ each, due respectively on the thirteenth of July, 1864, 1865 and 1866, and secured by mortgage on the property sold. This suit was brought on the last of these notes. *vi executione*, against the land in the possession of Phillips, but was subsequently changed into the action *via ordaria* against Foster.

The defense is that the purchaser has been evicted of the negroes for a cause existing at the date of the sale, to wit: the proclamation of emancipation of January 1, 1863, and that the amount paid exceeds the value of the land and movables, and therefore he owes nothing.

The District Judge dismissed the suit for the reason that the evidence disclosed a contract based on Confederate money, and the plaintiff has appealed.

As the proof of the character of the money in which the payments were made could not relieve either party, because the contract could neither be rescinded nor enforced on that account, it is immaterial to pass on the bill of exceptions taken to the admission of evidence for that purpose.

A. M. Haden v. L. Phillips and R. D. Foster.

The real issue presented is, can the defendant be made to pay a balance due on a contract for the sale of land, movables and slaves in block, when the evidence shows that the amount paid exceeds the value of the land and movables, as in this case, and that the sale was made after the date of the proclamation of emancipation.

In the case of Posey v. Driggs, 20 A. 199, it was held that a sale of a person as a slave after that event, conveyed no title to nor property in such person, and the payment of the alleged price could not be enforced. Applying the same doctrine to this case, the defendant acquired no title to the persons named in the act of sale as slaves, and the law will not presume that the payments made by him were for their price, but must be held to have been made on that which was and is property. And, besides, to make him pay the balance claimed, would virtually be enforcing a contract for the sale of persons by making him pay more than the full value of the land and movables bought by him. This is prohibited by the constitution and in conflict with the Wainwright and other similar cases.

For the reasons herein given it is ordered that the judgment of the court *a qua* be affirmed with costs.

21	518
49	480

No. 128.—B. W. MARSTON & Co. v. JAMES M. DEWBERRY. E. S. TURNER, Garnishee and Appellant.

Partnership property cannot be specially seized or attached for the individual debt of one of the partners. In such a case the interest of a partner may be seized.

APPEAL from the District Court, parish of Natchitoches. *Orrison J. S. M. Hyams*, for plaintiffs and appellees. *Pierson & Levy*, for garnishee, appellant.

HOWE, J. The plaintiffs and appellees have moved to dismiss this appeal, on the ground that the appeal bond is made in favor of the plaintiffs, and the defendant, Dewberry, appellees, and not in favor of the clerk of the court. It appears by the record, however, that the appeal was taken January 2, 1869, and the bond filed January 16, 1869. It comes, then, within the saving clause of the act of January 30, 1869, which provides "that all appeals taken subsequently to the twenty-ninth of September, 1868, and prior to the passage of this act, in conformity to the provisions of any law in force prior to that date, shall be as valid as if taken conformably to the act (of September 29, 1868), of which this is an amendment."

The motion to dismiss is therefore overruled.

The plaintiffs sued the defendant, Dewberry, upon a bill of goods and provisions amounting to \$1122 38, of which the sum of \$408 85 was alleged to be due for supplies furnished to the defendant for the making of a crop in partnership with E. S. Turner, the garnishee.

B. W. Marston & Co. v. James M. Dewberry. E. S. Turner, Garnishee and Appellant.

Upon the allegations that they had a privilege on the crop, and that Dewberry was a non-resident, they obtained writs of provisional seizure and attachment, which were levied upon certain cotton, corn and fodder, the property being specifically seized as the property of Dewberry in the hands of Turner.

The property was bonded by Turner, who moved to set aside the writs of provisional seizure and attachment, on the ground that the former remedy was improper, a sequestration being the writ provided by law, and that the bond given for the attachment was insufficient. The judge *a quo* denied the motion, on the ground that "the garnishee could not be affected by these proceedings, his answers to interrogatories being taken as conclusive evidence in his favor unless contradicted" and to this ruling the garnishee, Turner, reserved a bill of exceptions.

The defendant, Dewberry, came in and confessed judgment in favor of plaintiffs for the amount claimed.

In answer to the interrogatories propounded to him the garnishee, Turner, gave what we consider sufficiently distinct replies, from which, together with the other evidence in the case, it appears that Turner and Dewberry undertook to make a crop in 1867, Turner furnishing the land, tools, stock and supplies, and Dewberry the management and labor.

A number of acres were planted in cotton and corn, when, in June, 1867, Dewberry, in entire violation of his agreement, abandoned the place, leaving the crop "in grass," and went off to Texas, taking his laborers with him. For the protection of his own interests Turner was obliged to hire other laborers and complete the crop, at an expense exceeding the proceeds of the entire crop. At the moment of attachment, in October, 1867, Dewberry had no interest of any value in the crop. He had abandoned it in June, taking with him out of the venture all he had put in, his personal services and the laborers he had employed, and declaring he did not care what became of the crop. Turner proceeded on his own account to save the crop, and expended in so doing an amount greater than its proceeds.

There is no evidence that the plaintiffs ever furnished any supplies to the making of this crop, and their only claim, we apprehend, is as attaching creditors. As such their rights in the property can be no greater than those of Dewberry, and his, if they exist at all, have no appreciable value. The claim against Dewberry, so far as established by the record, is an individual debt, and partnership property can not, as a general rule, be specifically seized for the individual debt of one of the partners. The interest of a partner may be seized, but such seizure was not made in this case.

The judge *a quo* gave judgment against Dewberry for the amount claimed, and there was in this no error. He also gave judgment against the garnishee, Turner, for five hundred dollars, with interest from judicial demand, and "with a recognition of the privilege on the crops

B. W. Marston & Co. v. James M. Dewberry. E. S. Turner, Garnishee and Appellant.

in the hands of the garnishee, and that their lien and privilege on the property provisionally seized and attached be recognized and enforced to satisfy the judgment, and for costs to be taxed." For this portion of the judgment we find no sufficient foundation in the facts of the case. The view we have taken renders it unnecessary to pass upon the bill of exceptions.

For the reasons given, it is ordered and decreed that the judgment, so far as it is a personal judgment against the defendant, Dewberry, and so far as it fixes a fee for the attorney *ad hoc*, be affirmed; that in all other respects the said judgment be annulled, avoided and reversed; that the claim against the garnishee, E. S. Turner, be dismissed with costs, and that the plaintiffs pay the costs of the appeal.

No. 133.—Succession of CYRUS W. STAUFFER. Opposition of KATE M. JONES et al. to Account, etc.

The claim of the widow and heirs of one thousand dollars, allowed by the statute of 1852, out of the succession of the husband and father, can not be taken from the funds of a partnership of which the deceased husband was a member, while the partnership debts are unpaid, and before a division of the assets are made between the partners.

APPEAL from the Parish Court of Natchitoches. *Hiestand*, Parish Judge. *Jack & Pierson*, for appellant. *Pierson & Levy*, for opponents, appellees.

LUDELING, C. J. Cyrus W. Stauffer was a member of the commercial firm of Stauffer & Co. at the time of his death. His widow administered his estate, and took possession of the property and assets of the commercial partnership. The account and schedule of debts filed by the administratrix shows that the succession of Stauffer is insolvent, and that the property and assets belonging to the partnership of Stauffer & Co. will be insufficient to pay the debts of the firm. In the account filed the claim of the widow and heir of Cyrus W. Stauffer, under the act of seventeenth March, 1852, for one thousand dollars, is allowed as a privilege claim to be paid out of the funds belonging to the partnership of Stauffer & Co., after exhausting the funds belonging to the succession of Cyrus W. Stauffer.

This item is opposed by the creditors of the partnership, and the opposition was sustained.

The act of seventeenth March, 1852, says: "The widow or legal representative of the children shall be entitled to demand and receive from the succession of their deceased father or husband a sum which, added to the amount of property owned by either of them in their own right, will make up the sum of one thousand dollars, and which amount shall be paid in preference to all other debts except those for the vendor's privilege, and expenses incurred in selling the property." It is "from the succession of their deceased father or husband" that the

Succession of Cyrus W. Stauffer. Opposition of Kate M. Jones et al to account.

thousand dollars must be taken. The inquiry then is, what constitutes the property of the succession of Stauffer? Does the property of a partnership, of which the deceased was a member, constitute a part of his succession, when the debts of the partnership exceed the value of the property and assets of the partnership? It is clear that it does not. "No one partner has any right or share in the partnership property, except what remains thereof after the full discharge and payment of all debts and liabilities of the partnership." Story on Partnership, section ninety-seven.

When one of the partners dies, the debts of the partnership must be paid before there can be a division among the heirs. 11 M. 427; 13 La. 281. In the case of the United States v. Baulos' executor, the rule which should govern in like cases is well stated. The attorney of the United States claimed a privilege and preference in their favor over other creditors of Baulos, as created by an act of Congress relative to debts due to the United States in cases of insolvency. The court held "that they are entitled to such preference and privilege in ordinary cases cannot be doubted; but the present is not one of that nature." It appears that "Baulos became the debtor of the United States for the debt now claimed some years since; that he failed or was insolvent, and that he afterward entered into a partnership with one Cavaroc, by which they acquired some property; but the portion falling to the share of the deceased does not amount to more than will be sufficient to pay his part of the partnership debts. The Court of Probate accorded a preference to the creditors of the partnership over the claim of the United States." "The judgment of the court below is clearly correct. The *property* acquired by the partnership of Baulos & Cavaroc *does not belong to either of the partners separately*, but remains a common stock and pledge for the payment of the debts of the firm, in preference to any claim against the parties individually." 5 N. S. 568; 18 La. 505, Claiborne & Mather v. their creditors.

It is therefore ordered and adjudged that the judgment of the Parish Court be affirmed, and that the appellant pay the costs of this appeal Mr. Justice Wyly dissenting.

No. 114.—E. J. COCKFIELD, Tutor, v. H. W. FARLEY et al. and S. L. LEVY.

A payment on a promissory note, before prescription has accrued, by a third party, who has assumed the note in a notarial act, will interrupt prescription, which only begins to run again from the date of such payment.

A PPEAL from Ninth District Court, parish of Natchitoches. *Lewis, J. J. M. B. Tucker*, for plaintiff and appellant. *Pierson & Levy*, for defendants and appellees.

E. J. Cockfield, Tutor, v. H. W. Farley et al. and S. L. Levy.

WYLY, J. This is a contest between mortgage creditors for the proceeds of the sale of the mortgaged property in the hands of the sheriff.

At the succession sale of William Cockfield, Mrs. Martha T. Myers purchased a tract of land in the parish of Natchitoches, and in evidence of part of the purchase price she executed the note held by plaintiff, payable first May, 1861, for \$6333 33 $\frac{1}{4}$, with eight per cent. per annum interest from maturity, securing the same by special mortgage on the plantation bought.

On twelfth May, 1859, she sold the plantation to John L. Lewis, who assumed the payment of said outstanding note, gave his draft for a sum, and executed the notes held by the defendants, securing the same by special mortgage on the plantation purchased. On twenty-first November, 1865, John L. Lewis sold the land to David Pipes, who in turn assumed the payment of the note made by the original purchaser, Mrs. Martha T. Myers, and also the payment of the notes made by his vendor, Lewis, now held by the defendants, and gave another note for an additional sum, also executing a mortgage to secure the purchase price.

These acts of sale were duly recorded, the mortgages were inscribed in the mortgage office, and the mortgage given by Mrs. Myers to secure the note held by the plaintiff was duly reinscribed before the expiration of the ten years. On twelfth March, 1866, David Pipes paid on the note of Mrs. Myers, which he had assumed a large sum.

Subsequently the defendants foreclosed their mortgage on the property owned by Pipes, being the same given by John L. Lewis to Mrs. Myers. The plaintiff opposed the application of the fund to the mortgage of the defendants, claiming that he has a prior mortgage for the balance due on the note by Mrs. Myers, given in evidence of part of the price of the purchase of the land from the succession of William Cockfield, and an order was granted by the judge requiring the sheriff to hold the proceeds of the sale in his hands subject to the further order of the court. On the trial the judge ordered the claim of the plaintiff to be paid out of the proceeds in the sheriff's hands, concurrently with the defendants. Plaintiff has appealed.

The defendants contend that the claim of plaintiff is at the same time three debts, to wit: The debt of Mrs. Myers, who made the note, the debt of Lewis, who assumed it, and the debt of Pipes, who also assumed it; and that it is secured by three acts of mortgage, to wit: that given by Mrs. Myers to the succession of William Cockfield, that of Lewis, who assumed the debt and mortgaged the property to secure it as part of the price, together with the notes held by the defendants, and the mortgage given by Pipes to secure the purchase price, to wit: the notes held by both the plaintiff and the defendants, which he assumed.

E. J. Cockfield, Tutor, v. H. W. Farley et al. and S. L. Levy.

The defendants insist that the plea of prescription of five years, which they pleaded, should prevail, so far as to extinguish the debt of Mrs. Myers, and with the extinction of the debt the mortgage given by Mrs. Myers also became extinguished. They contend that the payment by Pipes did not interrupt prescription as to Mrs. Myers, although it did so as far as the assumpsit of the debt by Lewis and Pipes. That so far as Mrs. Myers is concerned the debt to the plaintiffs is prescribed, and the mortgage supporting it is consequently dead. They admit, however, that the debt as to Lewis and Pipes, resulting from their assumpsit, has vitality, and the mortgages granted by them alone secures it. And being secured in the same mortgage with the notes of the defendants the claim of the plaintiff can only be paid concurrently.

We do not concur in the view taken by the defendants. A large payment was made on the note before prescription accrued by Pipes, who in a notarial act assumed to pay the note for the maker Mrs. Myers. We regard the payment made by the purchaser, who retained in his hands the amount due to the original vendor and who had assumed to pay it, as an interruption of prescription as to both himself and the original debtor, being made in discharge of the obligation of the latter with her implied assent. 12 R. 399, and the authorities there cited. We think the note of Mrs. Myers, held by the plaintiff, is not prescribed, and the mortgage securing it having been duly inscribed and reinscribed, gives the plaintiff a preference on the funds to be distributed for the balance due on his claim.

It is therefore ordered that the judgment appealed from be so far amended as to allow the claim of plaintiff E. J. Cockfield, tutor, to be paid by preference out of the funds to be distributed, and in other respects that the judgment be affirmed, the defendants paying costs of both courts.

No. 149.—Succession of WILLIAM LEONARD. Opposition of DENNIS SULLIVAN.

The denial, under oath, of a signature to a promissory note, can only be overcome by one of the three kinds of proof required by article 325 of the Code of Practice.

APPEAL from the Ninth District Court, parish of Rapides. *Lewis, J. T. C. Manning*, for administrator and appellee, *Ryan & White*, for opponent and appellant.

WYLY, J. Dennis Sullivan appeals from a judgment rejecting his demand, dismissing his opposition, and homologating the account of the administrator of William Leonard's succession.

He claims that he is a creditor for \$3035 25, evidenced by five promissory notes of the deceased, and by an open account against him; that the administrator refused to allow his claims and place them

on his tableaux, and he prays that the account be amended by placing thereon said claims to be paid according to law.

The main defense is a denial that the notes were signed by the intestate William Leonard.

This is a question of law and fact. Has the opponent produced the kind of evidence required by law to overcome a denial of the signature?

When the demand is founded on an obligation or act under private signature the "defendant shall be bound in his answer to acknowledge expressly or to deny his signature." C. P. 324.

In the three hundred and twenty-fifth article of the same code it is declared that: "If the defendant deny his signature in his answer, or contend that the same has been counterfeited, the plaintiff *must prove the genuineness* of such signature, either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature, because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts, or by a comparison of the writing as established by the Civil Code."

There are, then, three kinds of proof by which a denial of signature may be overcome.

First—The proof of witnesses who have seen the act signed.

Second—The proof of witnesses who know the signature, having frequently seen the defendant write and sign his name.

Third—The proof by experts or comparison of the writing. 9 L. 409, 562; 1 A. 325; 4 A. 52; 21 A. 148.

The opponent has not attempted to introduce the proof of witnesses who knew the signature, nor the proof of experts, etc.

He has however introduced the proof of a witness who saw the deceased sign the note for \$250, which is a compliance with the law.

He also has introduced the proof of another witness, Hays, who says, "he is a subscribing witness to the note marked 'C' (for \$575), thinks Leonard signed the note, but can't say so positively."

This does not establish with legal certainty that the deceased signed this note; it is not sufficient to counterbalance the express denial of signature. 21 A. 148.

There is no other attempt made to establish the signature of the deceased to the notes by the kind of evidence required by law.

There is an attempt, however, to prove the signature of the subscribing witnesses to the notes.

This is not the kind of evidence provided by law to counterbalance the express denial of signature. 9 L. 562.

There was no attempt to prove the open account.

The opponent has only proved the signature to the note for \$250, which should have been allowed and placed on the tableaux.

Succession of William Leonard. Opposition of Dennis Sullivan.

It is therefore ordered that the judgment appealed from be amended as follows; that the opponent have judgment against said succession for two hundred and fifty dollars, with eight per cent. interest thereon from twentieth of March, 1863, to be paid in due course of administration, that his name be placed on the tableaux as a creditor for said amount, and as so amended that the judgment homologating the account be affirmed.

It is further ordered that the succession of William Leonard pay costs of both courts.

No. 136.—ST. LOUIS UNIVERSITY v. THEOPHILE PRUDHOMME AND WIFE.

After a separation of property the wife is not bound for the debts of the husband which were contracted before the separation, unless it is shown that the debt enured to her separate benefit or that of her separate property.

A debt for the support and education of the common offspring, contracted by the husband while he has the control and administration of the dotal property of the wife, cannot be enforced against the wife after she has resumed the administration of her separate estate by authority of a judgment of separation of property.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Orsborn, J. Jack & Pierson*, for plaintiff and appellee, *S. M. Hyams*, for defendants and appellants.

TALIAFERRO, J. The plaintiff by its proper representative instituted this suit against the defendants to recover the sum of \$961 98, the amount of an account which it is alleged the defendants owe the plaintiff for board, tuition, and incidental expenses of the defendants' son while a student of the institution during the year 1867, and part of the year 1863.

The husband in this case is a nominal party, the action being carried on mainly against the wife who is separate in property from her husband, the community that existed between them having been dissolved by the judgment of a competent court, which also decreed the husband to pay the wife the sum of \$1902 63 for her dotal and paraphernal claims, with privilege and mortgage upon his property, and authorized her to administer her separate property. This judgment was rendered on the seventeenth of April, 1863. This suit was instituted on the twenty-third of July of the same year. The wife filed an exception, which was adopted as part of her answer, in which she sets up a general denial and especially avers that the debt sued on was contracted during the existence of the community between herself and husband, and that now, after the dissolution of the community, and in the enjoyment and administration of her separate property, she is not responsible for the payment of the community debts. Judgment was rendered in favor of the plaintiff for the amount claimed, and the defendant appealed.

Under the state of facts presented we have to inquire whether the wife is liable individually and out of her own means for the payment of the debt sued upon. The claim is for board and instruction of her son in the St. Louis University, including also physician's bills and the usual incidental expenses. The correctness of this claim is not disputed. It is a community debt, and under the general principle should be acquitted out of the community funds. Civil Code article 2372.

The article 243 of the Code provides that "fathers and mothers, by the very act of marriage, contract together the obligation of supporting, maintaining and educating their children." And it is provided by article 2409 that "the wife who has obtained the separation of property must contribute in proportion to her fortune and that of her husband both to the household expenses and to those of the education of their children. She is bound to support those expenses alone if there remains nothing to her husband."

There could, we think, be no doubt that the wife would be liable for a debt, of the character of the one sued upon, contracted after the dissolution of the community, and a decree authorizing the wife to administer her own property, if the husband were insolvent. Does the fact of the debt having been contracted during the existence of the community exonerate her? The father and the mother, as we have seen by reference to the article 243 of the Code, by the very act of marrying contract together the obligation of supporting, maintaining and educating their children. The very act of marriage also superinduces between the parties the community of acquets and gains, unless it should be otherwise stipulated by a matrimonial contract. This obligation upon both the spouses to defray the expenses of maintaining, supporting and educating their common offspring necessarily subsists during the continuance of the community, although the husband, being the head and master of that community, is prominently liable for all its debts. This mutuality of obligation continues after a separation of property, for article 2409 of the Code provides that "the wife who has obtained a separation of property must contribute in proportion to her fortune and that of her husband both to the household expenses and those of the education of their children." But it is contended in this case that the husband, having had during the continuance of the community the administration of the wife's dowry and of her paraphernal estate, and received the revenues of both, which should have been applied to the discharge of the expenses of the marriage, and having failed so to apply those funds to the purposes contemplated by law, the creditor holding claims of this character must look to the husband alone for payment.

In regard to the continuance during the community of the mutual obligation of the spouses to provide for their common offspring, as expressed by articles 243 and 2409 of the Code, it is fair to conclude

St. Louis University v. Theophile Prudhomme and Wife.

from the import of other articles that during the community the wife's part of the obligation is provided for in the case of a dowry by article 2329, which declares that "the income or proceeds of the dowry belong to the husband, and are intended to help him to support the charges of the matrimony, such as the maintenance of the husband and wife, that of their children and other expenses which the husband deems proper." In the case of the present defendant she had dotal property which was under the administration of her husband up to the time of the judgment of separation of property, and its revenues, it may be said, were contributed on her part during the community to defray the charges specified in the article just quoted. After a judgment of separation of property and a dissolution of the community she would seem to be absolved from the payment of the debt for which she is sued, as it was one contracted alone by the husband, exigible in part out of the revenues of her dotal estate, of which she had no control, and which we find no positive law requiring her to pay after a renunciation by her of the community and a decree separating her in property from her husband. This case differs from some other community debts which during the community and even subsequently the wife may be made liable for, where it is clearly shown that they inured to the separate benefit of herself or of her separate property. The cases of *Dickerman v. Reagan*, 2 An. 243, and 5 An. 125; 8 An. 512, cited by the plaintiff's counsel do not in our view cover the case before us.

We therefore order, adjudge and decree that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that judgment be rendered in favor of the defendant, the plaintiff and appellee paying costs in both courts.

HOWELL, J. I concur in the decree in this case on the ground *only*, that the defendant, Mrs. Prudhomme, is not liable, because the debt was created before she obtained a separation of property.

NO. 129.—A. ARMSTRONG v. T. LECOMTE.

Article 128 of the State constitution of 1848, in declaring that "contracts for the sale of persons are null and void and shall not be enforced by the courts of this State," does not impair the obligations of a contract. It merely prohibits the execution of contracts that have been declared void by the sovereign power.

A third holder of negotiable paper before maturity is not excepted from the prohibition.

The prohibition against the enactment of laws impairing the obligations of contracts has no application to the sovereign power.

APPEAL from the District Court, parish of Natchitoches. *Orsborn, J. Pierson & Levy*, for plaintiff and appellant. *S. M. Hyams, Sr.*, for defendant and appellee.

A. Armstrong v. T. Lecomte.

HOWELL, J. This is a suit by a third holder, for value, before maturity, against the maker of a note, given as a part of the price of slaves and paraphed by the notary before whom the act of sale was passed.

The plaintiff has appealed from a judgment sustaining a peremptory exception founded on the one hundred and twenty-eighth article of the constitution of 1863, prohibiting the courts of this State from enforcing such contracts. His counsel present two questions for our consideration:

First—Does this case come within the provisions of said article, and—

Second—Is not the said article in conflict with section 10, article 1, of the United States Constitution?

I. Article 128 of the State Constitution says: "Contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State."

Its language is full, plain and comprehensive, including all contracts for the sale of persons. There is no limitation, no modification, no reservation in favor of those who were not originally parties to the contracts. It must be presumed that the convention was well aware of the principle of commercial law, invoked in behalf of commercial paper, and that, if it was intended or contemplated that third holders of such paper, for value, and without notice, given as the price of slaves, could enforce their payment against the purchaser, the reservation would have been expressly made. The very declaration that "all contracts for the sale of persons are null and void," reveals the scope of the said article and leaves no room for construction, and the prohibition allows no option to the courts, when it is shown that the contract sought to be enforced, whether by the vendor, his indorsee or other party, is one for the sale of persons. The obligation, contracted by the maker, was to pay the price of the slaves to the vendor or any other holder of the note which represents that price, and it is not within the power of the courts to enforce it.

II. The provision of the Constitution of the United States, with which it is contended the said article of our constitution conflicts, is that no State shall pass "any law impairing the obligation of contracts."

This would apply as well in the case of the contracting parties as to third holders of notes given in accordance with the terms of the contract, and the question arises, whether or not the organic law of the State impairs the obligation of contracts.

In our opinion, as held in the Wainwright case, whatever obligation ever existed in contracts for the sale of persons was destroyed by the nation, composed of the States subject to the inhibition in review, and that the State, in its fundamental law, has only recognized and not produced the effect, and has required its courts to do the same.

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The action of the nation in the prosecution of the late war, and the thirteenth and fourteenth amendments to the constitution, in demolishing and prohibiting slavery, have, as held in the Wainwright case, stricken all slave contracts with absolute nullity, and upon the principle which sustains the decision in that case, absolved the purchaser from all obligation to pay. "The prohibition against the enactment of laws impairing the obligations of contracts has no application to the sovereign power." Any and every claim for the loss or emancipation of slaves is expressly held to be illegal and void as to the United States and any State (section four, fourteenth amendment), and if so, no State can properly be called on, by virtue of the Constitution of the United States, for its authority through its courts to compel its citizens to pay the price of property lost to them by emancipation, a claim for which loss is expressly declared to be illegal and void. The fact that the note, which is the written evidence of the obligation, is in the hands of a third party, does not change the *origin* of the obligation.

We cannot avoid the conclusion that article one hundred and twenty-eight of the State Constitution applies to this action, and does not conflict with the Constitution of the United States, and that all commercial paper given for slaves and transferred before maturity for value, and without notice of its original consideration, falls within the prohibition to the courts.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Howe, J. dissenting.

No. 127.—JOHN LOUIS PEROT v. MARIE LOUISE LEVASSEUR.

A transfer or assignment of a promissory note secured by mortgage carries with it all the rights of mortgage, and privileges given to secure it.

Where a series of notes have been executed, secured by mortgage on the same piece of property, and the payee transfers them to different third parties, the privilege of the holders is concurrent on the proceeds of the sale of the mortgaged property. 1 Rob. 221 ; 16 L. 223.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Ryan, J. J. M. B. Tucker*, for plaintiff and appellee. *Chaplin & Son* and *Pierson & Levy*, for defendant and appellant.

TALIAFERRO, J. Madame Levasseur being owner and holder of four promissory notes executed in her favor for the payment of the price of a tract of land sold by her to McTier, transferred the one first due to Perot, the plaintiff. These notes constituted a series, bearing the same date, made payable at different periods, and their payment secured by mortgage and vendor's privilege. In September, 1865, Perot obtained judgment against McTier on the note he held, with recognition of the mortgage and privilege upon the land. Subsequently Mrs.

John Louis Perot v. Marie Louise Levasseur.

Levasseur obtained judgment on the other notes, and transferred the judgment to Henry, subrogating him to all her rights under the judgment which recognized the mortgage and vendor's privilege, and ordered a seizure and sale of the land. Mrs. Levasseur, or her transferee, caused the land to be sold under a writ *fiери facias*. Perot, the plaintiff by third opposition, enjoined the sheriff from paying over the proceeds of the property to the party seizing, alleging that he is entitled to priority in the distribution of the funds. Each note is for the sum of \$1080, with interest, and the land was sold for \$525. Each litigant denies the right of his adversary to participate in the appropriation of the money. Judgment was rendered in favor of the plaintiff, directing the proceeds to be paid to him by preference over all other claimants. From this judgment the defendant has appealed.

There is much difference between the counsel in their construction of the evidence introduced in the case. On the part of the defendant, it is denied that there is any evidence that Madame Levasseur ever indorsed the note held by Perot, and he is charged with fraud and bad faith. The only evidence in relation to the indorsement is that of Perot himself and two others. Perot testifies that he showed the note to Mrs. Levasseur, and that she said "she must have indorsed it." Two other witnesses state that they heard Mrs. Levasseur say that she did not think she had indorsed it, or that she did not recollect having indorsed it. We do not find any proof of fraud on the part of Perot. It is clear that he paid the amount of the note. This is not denied by defendant, who insists that the money was advanced by Perot for Metier, the maker of the note, and he contends that Perot has no subrogation of the payee's right of mortgage. There is on this point of the destination of the money paid by Perot a discrepancy in the evidence, but we think there is a preponderance in favor of the statement that Mrs. Levasseur owed a debt to Madame Scopini, and in order to obtain the money to pay it, transferred the note to Perot. This transfer carried with it all the privileges and mortgages attached to it. Civil Code, article 2615. The articles of the Code relative to payment with subrogation do not apply to the case of an absolute transfer of a debt which includes its accessories. See the case of Oakey & Hawkins v. the sheriff et al., 13 An. page 273. Here Mrs. Levasseur, needing money to pay her debt to Madame Scopini, sold the note to Perot, and consequently the accessory right of mortgage and privilege accompanied the sale.

It is argued on behalf of the plaintiff, that the first note of the series being transferred to him, Mrs. Levasseur could not come in ratably with him in the distribution of the proceeds of the mortgaged property in virtue of the other notes for which the property was equally mortgaged, and that not having that right she could not transfer it to another. The case of Salzman v. his creditors, 2 Rob. page 243, and 21 An. 261, are relied upon to support this position. The doctrine announced in Salzman v. his creditors is settled "that where the holder of a claim secured by mortgage assigns a part of it, he can not be per-

John Louis Perot v. Marie Louise Levasseur.

mitted to come in competition with his assignee if the pledge is insufficient to pay both." But this rule does not hold where a party having assigned a portion of the mortgage debt subsequently transfers other portions of it; for in this case the second transferee is not postponed. See 3 An. p. 144, *Adams et al. v. Leah*. All the assignees stand upon an equality, and partake concurrently. In the case just cited the court said: "This doctrine of equality has been frequently recognized," referring to 1 Rob. 224, and 16 La. 225.

We think that in this case the distribution should be made *pro rata*.

A bill of exceptions was taken to the ruling of the court refusing to receive a motion made by plaintiff, after both plaintiff and defendant had announced to the court that they had no further evidence to offer, to have experts appointed for the purpose of comparing the signature of Mrs. Levasseur on the back of the note in controversy, with her signature to the original act of sale of the land to McTier. The conclusion we have reached in this case renders it unnecessary that we should examine it.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed.

It is further ordered that the proceeds of the sale of the mortgaged property be divided *pro rata* between the plaintiff and the defendant.

It is further ordered that the costs in the lower court be paid out of the fund to be distributed; the plaintiff and appellee to pay the costs of appeal.

Rehearing refused.

No. 130.—Succession of F. G. BARTLETT, Opposition of H. K. CARTER to Provisional Account.

21	531
46	749

The Parish Court is without jurisdiction *ratione materia* in a suit for a moneyed demand for or against a succession where the amount in dispute is above five hundred dollars. *Swan v. Gale*, (ante page 478).

APPEAL from the Parish Court of the parish of Natchitoches. *Hies-tand*, Parish Judge. *Jack & Pierson*, for administratrix, appellant. *Pierson & Levy*, for plaintiff and appellee.

HOWE, J. The administrator having filed a provisional account in this succession, H. K. Carter filed an opposition on the grounds that he was a creditor of the succession in the sum of \$8008 20 upon certain mortgage notes, and that the account does not recognize him as a creditor at all. He also claimed that the sum allowed as a fee to the attorney of absent heirs ought to be reduced. He prayed that the debt claimed by him might be recognized as due by the succession, and his mortgage recognized.

There was judgment rejecting, dismissing and disallowing his de-

Succession of F. G. Bartlett, Opposition to H. K. Carter to Provisional Account.

mand, and by consent reducing the fee of the attorney of absent him, and the opponent appealed.

We felt constrained to decide lately at the Monroe term in the case of *Swan v. Gayle* that the parish courts have no jurisdiction of suits by or against a succession where the amount in dispute exceeds five hundred dollars (Constitution, article 87), and we must think that an opposition, like the one in this case, where the claim of the opponent is denied *in toto* is to all intents and purposes a suit. If the debt had been admitted to be due, and the question had been as to its rank or privilege, the parish court would have had jurisdiction under its power to settle successions. But the debt being denied, we think the opponent should have instituted an action in the District Court.

It is therefore ordered that the judgment appealed from be annulled and avoided, and that the opposition of H. K. Carter be dismissed, without prejudice, and that he pay the costs of both courts.

ON APPLICATION FOR REHEARING.

There is nothing in our judgment to prevent the opponent Carter from filing an opposition as such in the parish court by way of notice, and bringing his action in the District Court to establish his claim.

Rehearing refused.

No. 137.—V. W. PORTER v. J. BROWN AND T. CHALER.

A receipt given for money received is not conclusive between the parties and may be contradicted or explained by parol testimony.

Payment of a legacy to a minor in Confederate notes is not binding on the legatee for the reason of incapacity to give consent.

APPEAL from the District Court, parish of Natchitoches. *Orsborn, J. Jack & Pierson*, for plaintiff and appellee. *J. M. B. Tucker and Pierson & Levy*, for executors, appellants.

HOWELL, J. This is an action to recover the amount of a special legacy with interest.

In July, 1846 William Porter died, leaving a will containing the clause on which this suit is founded and which is in the following words: "It is my will that my executors" (Brown and Chaler, the defendants) "shall purchase from Benjamin Metoyer a certain child, the son of a girl they call Meme, provided the same can be purchased at a reasonable sum, and in case the purchase is effected, I give and bequeath unto it its freedom, with the sum of one thousand dollars, which is to be put on interest in the hands of some responsible person, the proceeds of which are to go to the support and schooling of the child, and when the boy arrives at the age of eighteen years of age, it is my will that the above amount of one thousand dollars be paid over to him, and in case of the death of the child, the money to go to my brothers and sisters."

V. W. Porter v. J. Brown and T. Chaler.

The first question presented is the peremptory exception of payment, evidenced by the plaintiff's receipt in full, which, it is alleged, must have its full effect, unless annulled by a direct action, in which the plaintiff must make an offer of restitution, and that the validity of the receipt cannot be inquired into collaterally in this suit, which is an ordinary action on a cause of action alleged to have originated before the receipt was given.

On the trial on this exception the only evidence introduced was the receipt and proof of the genuineness of the signatures and correctness of the date. The receipt is in the following words:

"I, Victorin, the child of Meme, a legatee under the will of William Porter, and eighteen years old, do hereby acknowledge to have received of Iml. Brown, executor of said will, the sum of one thousand dollars, in full of the legacy given me by said will.

(Signed)

"VICTORIN W. PORTER."

Attest: A. H. PIERSON,

J. M. B. TUCKER.

"NATCHITOCHES, LA., March 4, 1863.

"United States internal revenue, two cents, canceled."

The exception was properly overruled. It has often been held that a receipt for money is not conclusive between the parties, but open to explanation and contradiction by parol testimony. 5 A. 235, 408; 14 A. 274; 12 A. 401; 10 A. 749 and 9 A. 129.

This case is not properly assimilated to that of *Collins v. Collins*, 10 L. 268, which was a suit against the succession of the plaintiff's curator *ad bona* and the two sureties of the latter, and involved the settlement of two or three successions. Nor do the cases in 1 A. 37; 11 A. 631; 13 A. 228 and 472, sustain defendant's exception in this. They do not claim to have settled with the plaintiff as an heir to a succession, administered by them, or as his tutor, but simply to have paid him a *specific sum of money* left to him as a legacy and for the payment of which sum they hold his receipt. As before said, such a receipt is not conclusive between the parties and may, in an action for the money bequeathed, be explained.

At the trial on the merits, it was shown that the alleged payment on the fourth of March, 1863, which was also set up in the answer, was made in Confederate notes and while the plaintiff was a minor. He cannot be held to have given a legal consent to the payment and thereby bound as equally participating in the circulation of an illicit currency. Hence under the settled jurisprudence of the State on this question, there was no payment in law, and as the plea admits the existence of the debt, the verdict of the jury and judgment thereon are correct. It is superfluous to inquire into other questions presented in the pleadings and briefs.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Louis Dupleix v. Damasconé Gallien, Widow and Tutrix.

No. 31.—LOUIS DUPEIX v. DAMASCENE GALLIEN, Widow and Tutrix.

The stipulation in a written contract of sale of a lot of cotton, that "delivery is accepted," will dispense the vendor from further delivery, and place the property at the risk of the purchaser.

A PPEAL from the District Court, parish of Natchitoches. *Lewis, J. J. M. B. Tucker*, for plaintiff and appellee, *Pierson & Levy*, for defendant and appellant.

HOWELL, J. This suit was brought in September, 1865, against the defendant on the following instrument :

" Je susigné reconnais par ces présentes vendre et m'engage à livrer à Mr. Louis Dupleix, qui l'accepte, cinq mille livres de coton (good middling), sous balles au prix de sept cents la livre. Le dit coton devra rester sous le moulin de Mr. Victor Rachal ou toute autre personnes, sujet à ses ordres sans autre dépense à encourir de la part de Mr. L. Dupleix, jusqu' à l'expédition.

(Signé)

sa
" MARCELLE ~~X~~ LAPLANTE,
marque.

" LOUIS DUPEIX.

" Temoin : W. P. MORROW.

" NATCHITOCHEs, Fevrier 11, 1862."

Plaintiff demands the delivery, according to said contract, of five thousand pounds of ginned cotton, good middling, as his property, and in default thereof the sum of \$2500 as its value.

The defendant pleads the general denial, admits the sale by her deceased husband, as represented in the instrument sued on, and alleges a full compliance on his part with all the obligations of his contract.

The District Judge held the defendant liable because the deceased vendor failed to notify plaintiff of the place selected for delivery, and she has appealed.

It is shown that soon after the date of the above contract, Laplante called on Victor Rachal to gin, bale and store the cotton which he stated he had sold to plaintiff, and as the said Rachal could not do it, Laplante called on Louis Casimere Rachal at Madam Pallière Rachal's plantation on the river about fifteen or twenty arpents below Victor's, and had the cotton there ginned, baled, weighed, marked and stored, in March, 1862, as plaintiff's, using Victor Rachal's wagon in hauling the cotton from his own plantation opposite Victor's, to that of Madam Pallière's, where it remained until April or May, 1864, when it was burned by the Confederate and Federal armies.

Upon the hypothesis that it was incumbent on the seller to give the notice, as held by the judge, the circumstances raise a strong and weighty presumption that plaintiff was notified. His silence and inactivity for more than three years and a half leave but little doubt as to his personal knowledge.

Levis Dupleix v. Damascene Gallien, Widow and Tutrix.

But be this as it may the peculiar phraseology of the written instrument and facts of the case warrant the construction, which relieves the seller from any such obligation. It is expressly stated therein that the buyer accepted delivery, and the seller was only required to deposit the cotton at the gin of Victor Rachal or any other person, where it was to remain subject to the order of the buyer, without further expense to him, until its shipment. From this it may reasonably be inferred that the buyer undertook to ascertain where the cotton would be deposited. The seller with remarkable promptness and fidelity, executed his part of the contract, and the cotton remained where delivered more than two years before its destruction, which must be held to be the loss of plaintiff. C. C. 2442. The case of *Seris v. Bellocq*, 17 A. 146, differs from this in the material facts. Equity is very decidedly with the defendant in this case.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant, in the capacities in which she is sued, with costs in both courts.

Rehearing refused.

No. 97.—*E. Masson, Administrator, v. W. B. Murray, D. R. Carroll & Co., Intervenors.*

21	535
45	334
21	535
46	524

A party seeking to give to an inundation the character of an extraordinary accident must show that it was unusual, unforeseen, and one to which the country was not ordinarily subjected. The privilege of the merchant for supplies furnished the planter is equal in rank with that of the lessor. 13 An. 442.

A PPEAL from the District Court, parish of Natchitoches. *Levis, J.* *William H. Jack*, for plaintiff and appellee. *H. Safford*, for intervenor and appellant.

HOWELL, J. Plaintiff brought suit against the defendant, Murray, for six bales of cotton, of five hundred pounds each, and two hundred bushels of corn, or their value, as the rent of a plantation in the parish of Natchitoches for the year 1866, and caused the crop to be sequestered. D. R. Carroll & Co. intervened claiming \$1995 09, with interest, and privilege on the crop for supplies furnished to the plantation during the said year and averred that the rent should be reduced because the crop was reduced by the overflow of the Red river—a providential act. The defendant confessed judgment in favor of the intervenors and filed an answer to plaintiff's demand claiming a reduction of three bales of cotton and all the corn, in consequence of the overflow—an event beyond human control. Judgment was rendered in favor of plaintiff for the cotton and corn claimed, and maintaining the writ of sequestration, and in favor of the intervenors for \$995 09, with privilege on such part of the crop as may be left after satisfying the lessor's claim, from which the intervenors have appealed.

There is no dispute about the facts, but the intervenors ask that the judgment be amended, in three respects, as follows :

Under the state of facts presented we have to inquire whether the wife is liable individually and out of her own means for the payment of the debt sued upon. The claim is for board and instruction of her son in the St. Louis University, including also physician's bills and the usual incidental expenses. The correctness of this claim is not disputed. It is a community debt, and under the general principle should be acquitted out of the community funds. Civil Code article 2372.

The article 243 of the Code provides that "fathers and mothers, by the very act of marriage, contract together the obligation of supporting, maintaining and educating their children." And it is provided by article 2409 that "the wife who has obtained the separation of property must contribute in proportion to her fortune and that of her husband both to the household expenses and to those of the education of their children. She is bound to support those expenses alone if there remains nothing to her husband."

There could, we think, be no doubt that the wife would be liable for a debt, of the character of the one sued upon, contracted after the dissolution of the community, and a decree authorizing the wife to administer her own property, if the husband were insolvent. Does the fact of the debt having been contracted during the existence of the community exonerate her? The father and the mother, as we have seen by reference to the article 243 of the Code, by the very act of marrying contract together the obligation of supporting, maintaining and educating their children. The very act of marriage also superinduces between the parties the community of acquets and gains, unless it should be otherwise stipulated by a matrimonial contract. This obligation upon both the spouses to defray the expenses of maintaining, supporting and educating their common offspring necessarily subsists during the continuance of the community, although the husband, being the head and master of that community, is prominently liable for all its debts. This mutuality of obligation continues after a separation of property, for article 2409 of the Code provides that "the wife who has obtained a separation of property must contribute in proportion to her fortune and that of her husband both to the household expenses and those of the education of their children." But it is contended in this case that the husband, having had during the continuance of the community the administration of the wife's dowry and of her paraphernal estate, and received the revenues of both, which should have been applied to the discharge of the expenses of the marriage, and having failed so to apply those funds to the purposes contemplated by law, the creditor holding claims of this character must look to the husband alone for payment.

In regard to the continuance during the community of the mutual obligation of the spouses to provide for their common offspring, as expressed by articles 243 and 2409 of the Code, it is fair to conclude

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from the import of other articles that during the community the wife's part of the obligation is provided for in the case of a dowry by article 2329, which declares that "the income or proceeds of the dowry belong to the husband, and are intended to help him to support the charges of the matrimony, such as the maintenance of the husband and wife, that of their children and other expenses which the husband deems proper." In the case of the present defendant she had dotal property which was under the administration of her husband up to the time of the judgment of separation of property, and its revenues, it may be said, were contributed on her part during the community to defray the charges specified in the article just quoted. After a judgment of separation of property and a dissolution of the community she would seem to be absolved from the payment of the debt for which she is sued, as it was one contracted alone by the husband, exigible in part out of the revenues of her dotal estate, of which she had no control, and which we find no positive law requiring her to pay after a renunciation by her of the community and a decree separating her in property from her husband. This case differs from some other community debts which during the community and even subsequently the wife may be made liable for, where it is clearly shown that they inured to the separate benefit of herself or of her separate property. The cases of *Dickerman v. Reagan*, 2 An. 243, and 5 An. 125; 8 An. 512, cited by the plaintiff's counsel do not in our view cover the case before us.

We therefore order, adjudge and decree that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that judgment be rendered in favor of the defendant, the plaintiff and appellee paying costs in both courts.

HOWELL, J. I concur in the decree in this case on the ground *only*, that the defendant, Mrs. Prudhomme, is not liable, because the debt was created before she obtained a separation of property.

NO. 129.—A. ARMSTRONG v. T. LECOMTE.

Article 128 of the State constitution of 1868, in declaring that "contracts for the sale of persons are null and void and shall not be enforced by the courts of this State," does not impair the obligations of a contract. It merely prohibits the execution of contracts that have been declared void by the sovereign power.

A third holder of negotiable paper before maturity is not excepted from the prohibition.

The prohibition against the enactment of laws impairing the obligations of contracts has no application to the sovereign power.

A PPEAL from the District Court, parish of Natchitoches. *Orsborn, J. Pierson & Levy*, for plaintiff and appellant. *S. M. Hyams, Sr.*, for defendant and appellee.

Under the state of facts presented we have to inquire whether the wife is liable individually and out of her own means for the payment of the debt sued upon. The claim is for board and instruction of her son in the St. Louis University, including also physician's bills and the usual incidental expenses. The correctness of this claim is not disputed. It is a community debt, and under the general principle should be acquitted out of the community funds. Civil Code article 2372.

The article 243 of the Code provides that "fathers and mothers, by the very act of marriage, contract together the obligation of supporting, maintaining and educating their children." And it is provided by article 2409 that "the wife who has obtained the separation of property must contribute in proportion to her fortune and that of her husband both to the household expenses and to those of the education of their children. She is bound to support those expenses alone if there remains nothing to her husband."

There could, we think, be no doubt that the wife would be liable for a debt, of the character of the one sued upon, contracted after the dissolution of the community, and a decree authorizing the wife to administer her own property, if the husband were insolvent. Does the fact of the debt having been contracted during the existence of the community exonerate her? The father and the mother, as we have seen by reference to the article 243 of the Code, by the very act of marrying contract together the obligation of supporting, maintaining and educating their children. The very act of marriage also superinduces between the parties the community of acquets and gains, unless it should be otherwise stipulated by a matrimonial contract. This obligation upon both the spouses to defray the expenses of maintaining, supporting and educating their common offspring necessarily subsists during the continuance of the community, although the husband, being the head and master of that community, is prominently liable for all its debts. This mutuality of obligation continues after a separation of property, for article 2409 of the Code provides that "the wife who has obtained a separation of property must contribute in proportion to her fortune and that of her husband both to the household expenses and those of the education of their children." But it is contended in this case that the husband, having had during the continuance of the community the administration of the wife's dowry and of her paraphernal estate, and received the revenues of both, which should have been applied to the discharge of the expenses of the marriage, and having failed so to apply those funds to the purposes contemplated by law, the creditor holding claims of this character must look to the husband alone for payment.

In regard to the continuance during the community of the mutual obligation of the spouses to provide for their common offspring, as expressed by articles 243 and 2409 of the Code, it is fair to conclude

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from the import of other articles that during the community the wife's part of the obligation is provided for in the case of a dowry by article 2329, which declares that "the income or proceeds of the dowry belong to the husband, and are intended to help him to support the charges of the matrimony, such as the maintenance of the husband and wife, that of their children and other expenses which the husband deems proper." In the case of the present defendant she had dotal property which was under the administration of her husband up to the time of the judgment of separation of property, and its revenues, it may be said, were contributed on her part during the community to defray the charges specified in the article just quoted. After a judgment of separation of property and a dissolution of the community she would seem to be absolved from the payment of the debt for which she is sued, as it was one contracted alone by the husband, exigible in part out of the revenues of her dotal estate, of which she had no control, and which we find no positive law requiring her to pay after a renunciation by her of the community and a decree separating her in property from her husband. This case differs from some other community debts which during the community and even subsequently the wife may be made liable for, where it is clearly shown that they inured to the separate benefit of herself or of her separate property. The cases of *Dickerman v. Reagan*, 2 An. 243, and 5 An. 125; 8 An. 512, cited by the plaintiff's counsel do not in our view cover the case before us.

We therefore order, adjudge and decree that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that judgment be rendered in favor of the defendant, the plaintiff and appellee paying costs in both courts.

HOWELL, J. I concur in the decree in this case on the ground *only*, that the defendant, Mrs. Prudhomme, is not liable, because the debt was created before she obtained a separation of property.

NO. 129.—A. ARMSTRONG v. T. LECOMTE.

Article 128 of the State constitution of 1848, in declaring that "contracts for the sale of persons are null and void and shall not be enforced by the courts of this State," does not impair the obligations of a contract. It merely prohibits the execution of contracts that have been declared void by the sovereign power.

A third holder of negotiable paper before maturity is not excepted from the prohibition. The prohibition against the enactment of laws impairing the obligations of contracts has no application to the sovereign power.

APPEAL from the District Court, parish of Natchitoches. *Orsborn, J. Pierson & Levy*, for plaintiff and appellant. *S. M. Hyams, Sr.*, for defendant and appellee.

A. Armstrong v. T. Lecomte.

HOWELL, J. This is a suit by a third holder, for value, before maturity, against the maker of a note, given as a part of the price of slaves and paraphed by the notary before whom the act of sale was passed.

The plaintiff has appealed from a judgment sustaining a peremptory exception founded on the one hundred and twenty-eighth article of the constitution of 1863, prohibiting the courts of this State from enforcing such contracts. His counsel present two questions for our consideration :

First—Does this case come within the provisions of said article, and—

Second—Is not the said article in conflict with section 10, article 1, of the United States Constitution ?

I. Article 128 of the State Constitution says: "Contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State."

Its language is full, plain and comprehensive, including all contracts for the sale of persons. There is no limitation, no modification, no reservation in favor of those who were not originally parties to the contracts. It must be presumed that the convention was well aware of the principle of commercial law, invoked in behalf of commercial paper, and that, if it was intended or contemplated that third holders of such paper, for value, and without notice, given as the price of slaves, could enforce their payment against the purchaser, the reservation would have been expressly made. The very declaration that "all contracts for the sale of persons are null and void," reveals the scope of the said article and leaves no room for construction, and the prohibition allows no option to the courts, when it is shown that the contract sought to be enforced, whether by the vendor, his indorsee or other party, is one for the sale of persons. The obligation, contracted by the maker, was to pay the price of the slaves to the vendor or any other holder of the note which represents that price, and it is not within the power of the courts to enforce it.

II. The provision of the Constitution of the United States, with which it is contended the said article of our constitution conflicts, is that no State shall pass "any law impairing the obligation of contracts."

This would apply as well in the case of the contracting parties as to third holders of notes given in accordance with the terms of the contract, and the question arises, whether or not the organic law of the State impairs the obligation of contracts.

In our opinion, as held in the Wainwright case, whatever obligation ever existed in contracts for the sale of persons was destroyed by the nation, composed of the States subject to the inhibition in review, and that the State, in its fundamental law, has only recognized and not produced the effect, and has required its courts to do the same.

A. Armstrong v. T. Lecomte.

The action of the nation in the prosecution of the late war, and the thirteenth and fourteenth amendments to the constitution, in demolishing and prohibiting slavery, have, as held in the Wainwright case, stricken all slave contracts with absolute nullity, and upon the principle which sustains the decision in that case, absolved the purchaser from all obligation to pay. "The prohibition against the enactment of laws impairing the obligations of contracts has no application to the sovereign power." Any and every claim for the loss or emancipation of slaves is expressly held to be illegal and void as to the United States and any State (section four, fourteenth amendment), and if so, no State can properly be called on, by virtue of the Constitution of the United States, for its authority through its courts to compel its citizens to pay the price of property lost to them by emancipation, a claim for which loss is expressly declared to be illegal and void. The fact that the note, which is the written evidence of the obligation, is in the hands of a third party, does not change the *origin* of the obligation.

We cannot avoid the conclusion that article one hundred and twenty-eight of the State Constitution applies to this action, and does not conflict with the Constitution of the United States, and that all commercial paper given for slaves and transferred before maturity for value, and without notice of its original consideration, falls within the prohibition to the courts.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Howe, J. dissenting.

No. 127.--JOHN LOUIS PEROT v. MARIE LOUISE LEVASSEUR.

A transfer or assignment of a promissory note secured by mortgage carries with it all the rights of mortgage, and privileges given to secure it.

Where a series of notes have been executed, secured by mortgage on the same piece of property, and the payee transfers them to different third parties, the privilege of the holders is concurrent on the proceeds of the sale of the mortgaged property. 1 Rob. 221; 16 La. 323.

APPEAL from the Ninth Judicial District Court, parish of Natchitoches. *Ryan, J. J. M. B. Tucker*, for plaintiff and appellee. *Chaplin & Son* and *Pierson & Levy*, for defendant and appellant.

TALIAFERRO, J. Madame Levasseur being owner and holder of four promissory notes executed in her favor for the payment of the price of a tract of land sold by her to McTier, transferred the one first due to Perot, the plaintiff. These notes constituted a series, bearing the same date, made payable at different periods, and their payment secured by mortgage and vendor's privilege. In September, 1865, Perot obtained judgment against McTier on the note he held, with recognition of the mortgage and privilege upon the land. Subsequently Mrs.

R. W. Turner v. William H. Hill and N. A. Durdin.

into and testing the capacity and right of persons holding and exercising public offices. Whether the defendant is or is not constitutionally and legally sheriff of the parish of Bossier, we cannot in this form of proceeding undertake to determine. It is sufficient *prima facie* that he was duly commissioned in 1866, and no successor has been installed into office. The State Constitution, article 122, provides that "all officers shall continue to discharge the duties of their offices until their successors shall have been inducted into office, except in cases of impeachment or suspension."

In the case of *Gradingo v. Moore*, curator, 10 An. 690, this court declared that "the capacity of sheriffs duly commissioned to exercise the duties of their office, is not to be brought in question by third persons in this collateral manner, nor the rights of litigants to be made to depend upon a future possible controversy between the State and one of its officers," and added: "For the determination of this cause it is enough for us to know that Jean Baptiste David was, at the time his deputy served the citation, *de facto* sheriff of St. Landry, under color of title; it would not vitiate the service as between these parties, though it should ultimately turn out that David was not sheriff *de jure*."

The judgment of the District Court was properly rendered.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 119.—Succession of MAHALA SPROWL.

An executor is not permitted to make any charges against the estate he administers for services rendered, other than the two and a half per cent. commissions allowed him by law on the amount of the inventory.

An executor, having received the funds of the estate he administers and afterward disposed of them for notes of the so-called Confederate States will be held liable to the heirs for the amount thus received.

A PPEAL from the Parish Court of the Parish of Natchitoches. *Lewis J. Pierson & Levy*, for executor, appellee. *A. Lemee*, attorney for absent heirs, appellant.

LUDELING, C. J. Daniel Brown, the executor of the last will of Mahala Sprowl, filed an account of his administration on the sixth of February, 1866.

An opposition thereto was filed by the attorney for the absent heirs, praying that the following items of the account be disallowed, to wit: Two hundred and ninety-six dollars due the executor for ginning and pressing the cotton in 1860, five hundred dollars due the executor for superintending the plantation in 1859, and sixteen thousand nine hundred and ninety-seven dollars and fifty-two cents claimed as a credit for Confederate notes collected by the executor. The judge *a quo* sustained the opposition made to the item for five hundred dollars, and dismissed it as to the other two items, and the opponent has appealed.

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Succession of Mahala Sprowl.

We think the charge for ginning and pressing the cotton should not be allowed. A family meeting, convoked on the ninth day of November, 1859, recommended the sale of the plantation, mules, slaves, etc., and the sale was not made until the fifth day of January, 1860. No reason is shown why the cotton was not ginned and pressed before the sale. It was the duty of the executor to have caused this to be done, and we will not permit him to take advantage of his laches to enrich himself.

The charge made by the executor for *superintending* the plantation is not a proper charge. The commissions allowed him by law are intended to compensate him for his superintendence and care of the property of the estate. C. C. article 1676; 1 R. 400. The facts in the case of the succession of Isaac Pipkin, reported in 7 An. p. 617, may have justified the court in coming to the conclusion which they did, but we think the ruling in the case of Baldwin's executors v. Carleton more salutary and in consonance with the Civil Code, which declares that the executor "shall be entitled, *for his trouble and care*, to a commission of two and a half per cent. on the whole amount of the estimate of the inventory," etc.

We cannot allow the executor the credit for sixteen thousand nine hundred and ninety-seven dollars and fifty-two cents claimed by him to be for balance of Confederate notes on hand at the surrender. There is no evidence in the record to show that the notes of W. W. Brown, given for slaves, were paid in Confederate notes. The only evidence offered to prove this fact is the testimony of the executor himself; and his testimony shows that W. W. Brown settled these notes in February, 1862, by transferring to the executor sufficient funds, which he had in the hands of Payne, Huntington & Co. And the same testimony satisfies us that the funds in the hands of Payne, Huntington & Co., belonging to W. W. Brown in February, 1862, consisted of lawful money, and not Confederate notes. Having collected the slave notes he must account for them. "He is bound to restore to his principal whatever he has received by virtue of his procuration, even should he have received it unduly." C. C. 2974.

It is contended by the executor that he acted as a prudent man, and that he believed the settlement with Payne, Huntington & Co. a good one, and that therefore he should be released from responsibility. The evidence does not satisfy us that the executor administered the property prudently or faithfully. Whatever may have been his opinion or the opinions of his neighbors relative to the eventual success of the Confederate States in insurrection, the executor was not authorized to speculate in stocks of the said States with funds belonging to the estate administered by him. In this case the executor's duties were plainly indicated by his mandate, the testament of Mahala Sprowl. 3 An. 408. "If a man undertakes an office of kindness he must discharge the duty

faithfully and prudently, otherwise he is responsible for the consequences." 10 M. 708; *Fitz v. Richard*, 20 An. 549, and succession *J. W. Wilder*, 21 An. The evidence shows that the notes of Mrs. Manning for three hundred dollars, given for a slave, were collected in Confederate notes, and for this sum the executor would not be responsible. But having used it in the payment of Confederate taxes, which are not opposed, he is not entitled to any other credit for it. We do not consider that the letters of Mrs. V. G. Sprowl, one of the legatees of the testatrix, ratify the acts of the executor in any manner, even if she had the power to do so.

It is therefore ordered; adjudged and decreed that the judgment of the District Court be avoided and reversed; that the opposition of the attorney of absent heirs be sustained, and that there be judgment against Daniel Brown, executor of the last will of Mahala Sprowl, and in favor of the heirs and legatees of Mahala Sprowl for the sum of seventeen thousand seven hundred and ninety-three dollars and fifty-two cents, with five per cent. per annum interest thereon from the sixth February, 1866, till paid, and the costs of this appeal. It is further ordered that in other respects the account be homologated.

Rehearing refused.

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No. 187.—STATE OF LOUISIANA *v.* McLEAN and HAMILTON.

Where two parties are tried together for the crime of murder, each one is entitled to twelve peremptory challenges to the jurors. In such a case the privileges of the one must not be prejudiced by the acts of the other.

The objection that one of the petit jurors was not a registered voter, comes too late if not made until after verdict.

APPEAL from the District Court, parish of Bossier. *Levisse, J.* Robert J. Looney, District Attorney, for the State, *J. R. Griffin* and *R. W. Turner*, for defendants and appellants.

HOWE, J. The defendants were indicted for murder, and having been tried and found "guilty without capital punishment," were sentenced to imprisonment at hard labor for the term of their natural lives. From this judgment they have appealed.

It appears by the record that they were tried jointly, and that after McLean had challenged two jurors peremptorily, and Hamilton had in the same manner challenged ten, the counsel for the State objected to the peremptory challenge of another juror by Hamilton on the ground that the prisoners together had exhausted the twelve peremptory challenges accorded by law. The court sustained this objection, and the defendant, Hamilton, reserved a bill of exceptions.

We are of opinion that the ruling of the court was erroneous. The right of peremptory challenge is one of great importance, and where prisoners are tried together the privilege of one should not be prejudiced by the acts of the other. If twelve challenges are to be dis-

State of Louisiana v. McLean and Hamilton.

tributed between two or more defendants, how is the division to be made? In what order and in what ratio are the shares to be parceled out? When thirteen defendants are tried jointly shall each be declared to have twelve-thirteenths of a peremptory challenge? We think the law accords to each prisoner a right to twelve challenges of the peremptory sort. Acts of 1855, p. — State v. Cazeau, 8 Ann. 114.

We see no reason, however, for disturbing the judgment as to the defendant McLean. His only ground of complaint is that J. L. Bigga, one of the jurors, a talesman, was not a registered voter; but this objection was made for the first time after verdict, on motion for a new trial. The objection came too late. The petit jurors are severally presented to the prisoner before being empaneled and sworn; and it is his duty at that time to examine them, if he desires to test their qualifications. 6 Ann. 310; 8 Rob. 590.

For the reasons given it is ordered and adjudged that the judgment appealed from, as to the defendant *McLean*, be affirmed with costs; and that as to the defendant *Hamilton* the said judgment be avoided and reversed, and the cause remanded for a new trial according to law.

No. 131.—JAMES H. MUMFORD v. E. MCKINNEY.

Parol evidence is not admissible to establish an agency to sell land.

A party cannot attack, in the courts, the claim of a pre-emptor, without showing a prior equitable right to the land.

A possessor in good faith on eviction, is entitled to recover the amounts expended by him in useful improvements made on the land.

APPEAL from the District Court, parish of Natchitoches. *Orsborn, J. R. J. Bowman* and *B. J. Cunningham*, for plaintiff and appellant. *Wm. M. Levy*, for defendant. *A. H. Pierson* and *J. M. B. Tucker*, for warrantors, appellees.

LUDELING, C. J. This is a petitory action to recover seventy-two acres of land situated in the parish of Natchitoches. The plaintiff claims rents for the lands from first day of January, 1852, and for damages.

The defendant sets up title by purchase from T. C. Walmsley, who bought from Whitfield Williams, who purchased from Walkinshaw, who bought from Zadoc Mumford, the father of the plaintiff. The vendors were successively called in warranty. The defendant and the warrantors derive their title from Zadoc Mumford, and they allege that the plaintiff, who is the son of Zadoc Mumford, ratified the sale.

There was a verdict and judgment for the defendant, and the plaintiff has appealed.

There was a bill of exceptions taken to the ruling of the judge *quo* receiving the testimony of Zadoc Mumford, on the grounds that parol testimony is not admissible to establish an agency for the sale of lands, nor to prove a subsequent ratification, and that the written act could not be contradicted.

James H. Mumford v. E. McKimney.

The evidence could not be received to establish an agency to sell lands. C. C. 2961.

It was admissible to prove a ratification. *Crownover v. Randall* (decided at Monroe.)

The second bill of exceptions was to the admission of proof that at the time the land was pre-empted by plaintiff he was a minor, and that he perpetrated a fraud upon the government.

It is well settled that one, without a prior equitable right to the land, can not attack in the courts the claim of the pre-emptor, who holds a title from the United States. In this case the land department at Washington may cancel the entry, but this court has no right to examine into the regularity of the proceedings before the Register and Receiver, as it is not pretended that the defendants had a prior equitable right to the land when the pre-emptor entered it. *Wilcox v. Jackson*, 13 Peters—; *Lytle v. the State of Arkansas*.

The record does not contain any proof of a ratification by the plaintiff of the sale; nor had the defendant been in possession of the lands ten years when this action was commenced.

The defendant is a possessor in good faith, and he is entitled to be reimbursed the amounts expended in useful improvements. The verdict and judgment are erroneous. But justice requires that the case should be remanded, to enable the defendant to prove more accurately the enhanced value of the property resulting from the improvements placed on the lands.

It is therefore ordered and adjudged that the verdict of the jury be set aside; that the judgment of the District Court be annulled, and that this case be remanded to the District Court to be tried according to law, and that the appellees pay the costs of appeal.

Rehearing refused.

No. 123.—A. B. JAMES & Co. v. ABSALOM WADE.

Where the mail service can not be used as a means of conveying notice, the holder of commercial paper is not excused if he fails to use all other means within his reach of bringing home notice to the party whom he wishes to charge. 20 A. 399.

To hold the indorser on a promise to pay a promissory note after discharge, the holder must show that the promise was made with a full knowledge of his discharge.

APPEAL from the District Court, parish of Winn. *Orsborn, J. J. C. Weeks and J. M. B. Tucker*, for plaintiffs and appellants. *Jack & Pierson*, for defendant and appellee.

HOWE, J. The defendant is sued as the indorser of a bill of exchange drawn by W. R. Hughes on Moore & Browder, of New Orleans, and by the latter accepted, payable on the fifteenth February, 1863.

On the day of its maturity the bill was protested by a notary in New Orleans, and a notice deposited in the Postoffice in that city addressed to the defendant, at Winnfield, parish of Winn, Louisiana.

A. B. James & Co. v. Absalom Wade.

The record shows that in February, 1863, all postal and commercial intercourse was suspended between New Orleans and Winnfield. The war was then raging, and the deposit of the notice in the Postoffice in New Orleans had no effect in converting the conditional obligation of the indorser into an absolute liability. 19 A. 43, 63, 64, 72, 90; 20 A. 399.

If the holders of this bill desired to bind the indorser, it was their duty to have given him notice of dishonor within a reasonable time after the close of the war, and the resumption of commercial intercourse. There being no evidence that any notice except the one described above was ever given, the indorser must be held to have been discharged.

It is, however, urged that in 1867 the defendant promised to pay the bill, and that at the time he made such promise he was aware that he had been already discharged by the *laches* of the holders. On this point the only testimony on behalf of plaintiffs is the following statement by one of their witnesses:

"I brought up the original claim or draft due the firm of A. B. James & Co. to this place some time in April, 1867, and presented it to Dr. Wade. The doctor looked at it, and said that the indorsement upon the draft was his signature, and that was another of his misfortunes during the war; that at the time he indorsed it he supposed that this man Hughes would pay it at maturity, but supposed that he had not, and that he would have it to pay. Dr. Wade remarked to witness that he was going to the city in a few days—that he would call on A. B. James & Co. and try and settle it with them there. That the arrangement, he thought, would be made quicker than witness could effect it by bringing suit. Witness agreed to wait on Dr. Wade."

The defendant testified that in this interview he only proposed a compromise, and that when he went to New Orleans he offered to give the plaintiffs, by way of compromise, some land worth about five hundred dollars, which they refused to accept.

It is by no means certain that the promise sought to be established in this case was so explicit and absolute as to satisfy the requirements of the law. 16 La. 315; 2 A. 16.

But if the promise was made by defendant, it does not appear that it was made with a full knowledge of his discharge, and proof of such knowledge is clearly required to enable the plaintiffs to recover.

The language we have quoted does not justify the inference that Dr. Wade knew that the holders had failed to give him legal notice of the dishonor of the bill. It is rather the language of a man who supposed his liability to be clear, and who ruefully predicted that he would be forced to pay.

We conclude that the judgment rendered by the court *a qua* in favor

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of defendant was not erroneous. 11 L. 17; 13 L. 368; 1 R. 83; 17 L. 336; 7 R. 331.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 1.—STATE OF LOUISIANA ex. rel. M. H. TWICHELL v. JAMES R. HEAD.

The District Judge is without authority, either on his own motion or by the consent of parties, to transfer a suit from the parish of the domicile of the defendant to another parish of the State. All proceedings had in a cause after such transfer are null.

APPEAL from the Eleventh Judicial District Court. *Louis, J. N. J. Sandlin*, District Attorney. *L. B. Watkins* and *J. M. Jones*, for relator. *J. R. Head*, *pro se*.

HOWELL, J. On the twenty-first June, 1869, the petition in this case, addressed to the "Judge of the Eleventh Judicial District of the State of Louisiana, holding sessions in and for the parish of Bienville," was filed in the clerk's office in said parish, in which it is alleged that the defendant is unlawfully holding and exercising the office of parish judge of the parish of Bienville, and judgment is asked against him and in favor of the relator, M. H. Twichell. The defendant was cited in the usual form to answer in said parish, on the first Monday of September, 1869. The judge of the district then issued an order addressed to the defendant, to appear before him in chambers at Minden, Claiborne parish, on the second Monday in July, to try the case, and another order to the clerk of the District Court for Bienville parish to be present at said trial, with all the papers in his office appertaining to said case, and to act as clerk of the District Court as fully as at a regular term. Another citation was then issued by said clerk to the defendant, citing him "to appear before the Judge of the *Eleventh District Court* in chambers at the town of Minden, *in the parish of Claiborne*, and comply with the prayer of the annexed petition, or file your (his) answer thereto in writing, in the office of the clerk of the District Court *in and for the parish of Bienville*, on the second Monday in July next," on which day, the record states, the court was opened, answer filed, jury disallowed, application for a continuance granted to the first Monday in August, and court adjourned to said date (second August, 1869), all at Minden, Claiborne parish. The record further shows that the "court met pursuant to adjournment, in the town of Minden, parish of Claiborne, on the first Monday of August," etc., at which time and place exceptions to the jurisdiction of the court were filed and overruled; trial was had, judgment rendered, and appeal granted. The above exceptions were not taken to the place and manner of trial, but it is now contended before us that the District Judge had no legal power to transfer the "District Court in and for the parish of Bienville" to Claiborne parish, and compel the defendant, his witnesses and the clerk to attend in the latter parish.

State of Louisiana ex rel. M. H. Twichell v. James R. Head.

These proceedings were not only totally without authority in law, but are in evasion of the one hundred and sixty-second article of the C. P., as amended by the act of March 19, 1861, and construed by this court in the case of the State v. Judge of the Eleventh District, 21 A. n. 258. We there held that no one is permitted to consent to be sued elsewhere than in the parish of his domicile or residence, except in cases expressly provided for by law, and this case is not within such exceptions. The authority in act No. 156 of the statutes of 1868, to try such cases in chambers, does not authorize the judge of a district to remove the parties and officers of one parish to another, but simply to try a case in chambers, *in the parish*, where the suit must be brought. Section 2 of said act makes it the duty of the District Attorney of the parish *in which the case arises*, and of the Attorney General in the parish of Orleans, to bring such action against the offending party when required. Section 3 requires service to be made, and the answer of the defendant to be filed within the delays, *the same as in other civil suits*, and the case to be tried by preference over all other cases, without being fixed for trial, after issue joined; and section 13 confers the additional right to have the case tried in chambers, or at a special term of the court, called by the judge of the district, upon giving legal notice to the parties interested, and it also reserves to each party the right of trial by a special jury, to be summoned according to law.

There is nothing in any of these provisions, or any other part of said act, giving the judge of the district power or authority to try the case out of the parish in which it arises. On the contrary, they plainly imply that the action shall be brought *and tried* in the parish of the defendant's residence or domicile, as in other civil suits.

We are constrained, therefore, to declare all the proceedings had before the district judge in this matter null and void, and as a legal sequence there are no other questions properly presented for our consideration.

It is therefore ordered that the judgment from which this appeal is granted, and all other proceedings herein before the district judge in the parish of Claiborne, including the orders of twenty-sixth June, 1869, to the defendant and to the clerk, be declared null and void, and that this cause be remanded to the District Court in and for the parish of Bienville, to be proceeded in according to law. Costs of appeal to be paid by the appellee.

NO 153.—UNION BANK OF LOUISIANA v. MICHAEL RYAN.

When the defendant, the maker of a promissory note, establishes a failure of consideration as between himself and his payee, amounting to a fraud, the holder by indorsement is obliged to show that either he or some preceding holder took it in good faith and for value.

APPEAL from the District Court, parish of Rapides., *Lewis, J. Manning*, for plaintiff and appellant. *Ryan & White*, for defendant and appellee.

HOWE, J. This suit was instituted upon a promissory note made by defendant dated March 20, 1861, and payable February 10, 1862, to the order of Rotchford, Brown & Co., and by the latter indorsed.

The defendant admits in his answer the execution of the note but denies indebtedness to any one thereon, and avers that the note is really his own property; that it never passed into the hands of plaintiff in the ordinary course of business, that it was really controlled by Rotchford, Brown & Co., the bank being only a nominal party; that during the year 1859 the defendant purchased a number of slaves, and that Rotchford, Brown & Co. indorsed part of the notes given for their price, payable one year after date; that, when the notes were about to mature, Rotchford, Brown & Co. wrote to defendant and enclosed four notes to be signed by defendant, to take up or renew the original notes, leaving blanks for date and time of payment; that the defendant signed these notes and sent them forward for the purpose stated, but that Rotchford, Brown & Co. never took up those original notes, but used the series of notes of which the obligation in suit was one for their own benefit without the consent of the defendant, who was obliged after the war to pay the original notes to the holders thereof.

There was judgment in favor of defendant and plaintiff has appealed.

The evidence shows a total failure of consideration of the note in suit as between the maker and the payees. It was executed and sent to the latter for a specific purpose, to be used in the renewal of notes about to fall due. It was not so used, but was misapplied by Rotchford, Brown & Co., to other purposes, and the defendant was obliged to pay the original notes. Upon the trial an account current between Rotchford, Brown & Co. and the defendant was offered by plaintiff, and on this the defendant appears to have been credited with the proceeds of the note in suit, by discount, \$4926 80, but the account was not in any wise proved; it was only admitted by consent of defendant to establish "the fact that such an account was rendered, but not that defendant ever consented to its correctness or that it was binding on him."

The defendant then having clearly established a failure of consideration through the fraud of his payees, it remains for us to consider what effect this fact has upon the rights of the plaintiff.

We consider it well settled that when upon the trial of a case like this the defendant clearly establishes failure of consideration, as between himself and his payee, amounting to a fraud, the plaintiff, as indorsee, is required to explain the circumstances of his possession, and to show that either he or some preceding party to the note took it in good faith and for value. Bayley on Bills, p. 492 to 495, and notes; 9 Ann. 20, 22.

Union Bank of Louisiana v. Michael Ryan.

The plaintiff in this case made no such proof, and we therefore conclude that the judgment of the court *a qua* was correct.

It is therefore ordered that the judgment appealed from be affirmed with costs.

No. 154.—ROBERT C. HYNSON v. JOHN CORDUKES and the Estate of R. C. HYNSON, Jr.

The lessor has a privilege for the payment of the rent on all the movables found on the leased premises without reference to whether such property belongs jointly to the partners in the planting business, or to one of them only. 19 An. 112; 20 An. 208.
Evidence is inadmissible in a suit by the lessor for rent, to show the terms and conditions of a partnership between the lessees.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Lewis, J. R. A. Hunter*, for plaintiff and appellee. *T. C. Manning, Ryan & White*, for defendants and appellants.

TALIAFERRO, J. The plaintiff leased his plantation for the years 1866 and 1867 to his son, R. C. Hynson, Jr. He reserved to himself a small portion of the land surrounding the mansion house in which he continued to reside. The number of acres leased in 1866 was twelve hundred and eighty, and for the year 1867, reserving to himself a larger quantity than he did in 1866, the quantity of land leased was nine hundred and thirty acres. Six dollars per acre for each year was the amount agreed upon for the rent. R. C. Hynson, Jr., being without means himself to sustain the expense of carrying on the cultivation of the place entered into a planting partnership with the defendant, Cordukes, who made all the advances necessary and paid for the supplies and current expenses of the plantation. This partnership was entered into about the time the lease was made. Besides the current expenses for the year 1866, it was essential to the enterprise the parties had engaged in, to erect new buildings on the plantation, which by the calamities of war had become stripped of all its improvements. A costly steam gin and mill with all the necessary machinery were built and established—besides other works of a permanent character were made. The entire cost of these improvements was paid by Cordukes. It was stipulated in the contract of lease that the cost of replenishing the place with necessary and permanent improvements should be taken out of the rent for the year 1866, the cost not to exceed the amount of the rent. There was no obligation on the part of the plaintiff to pay for any improvements made in 1867, as it was deemed that those made in 1866 were sufficient. A corn crib and a cabin, however, were built in 1867.

The plaintiff claims \$13,260 for rent of the plantation for the two years. The defendant, Cordukes, claims as cost of the improvements he put upon the place \$10,245, and presented an account with vouchers to establish it. A part of the account was rejected in the

Robert C. Hynson v. John Cordukes and the Estate of R. C. Hynson, Jr.

court below, which reduced his claim to \$8819 46. To this reduction we do not see that he objected. Robert C. Hynson, Jr., died in the latter part of the year 1867, and Cordukes became his administrator. Soon after the plaintiff instituted this suit against Cordukes and the estate of Robert C. Hynson, Jr., jointly, for \$4440 54, the balance due, as he claims, after deducting the \$8819 46 for the improvements.

The plaintiff had judgment in his favor on this basis for \$2220 27, with legal interest from service of citation, against Cordukes, individually, and for the like sum and interest against him as administrator of the estate of Robert C. Hynson, Jr. The judgment also recognized the plaintiff's right of privilege as lessor upon the work animals, mules, farming utensils, etc. found upon the place and ordered them (already in the hands of the sheriff by provisional seizure) to be sold to pay the judgment. From this judgment the defendant, individually, and as administrator, appealed.

The defense is, that by the contract between the defendant, Cordukes, and Robert C. Hynson, Jr., an ordinary partnership was formed; that each partner is bound only for his half of the debts. On this ground he contends that his expenditures in permanent improvements made on plaintiff's plantation exceeds one-half the amount of the rent, and he accordingly claims from the plaintiff, in reconvention, the excess, which he places at \$5000. He also claims damages for the provisional seizure of the mules, stock, etc., found on the plantation, all of which, he alleges, belong to him individually.

A bill of exceptions was taken by the defendant to the exclusion of evidence offered by him to show the terms and conditions of the partnership entered into between himself and Robert C. Hynson, Jr. The evidence was properly excluded. The stipulations of the partners between themselves could not affect the plaintiff who was not a party to them. A second bill of exceptions to the same purport was taken which it is not necessary to consider.

We think the judgment of the lower court correct. Here was a debt for the payment of which the law accords a privilege of the highest order. The defendant had been allowed the amount of his disbursements for improvements on the plaintiff's plantation and a balance remained. This balance was owing by the partnership, and whether jointly or not, the lessor's privilege bore upon all the personal property found upon the leased premises without reference to whether such property belonged jointly to the partners in the planting adventure or to one of them only. Civil Code article 2675; 19 An. 112; 20 An. 266; Civil Code 3185. See also, 18 L. R. 193; 3 Rob. 52; 10 An. 627.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

President, etc., of Louisiana State Bank v. Valery Gaiennie.

No. 116.—PRESIDENT, ETC., OF LOUISIANA STATE BANK v. VALERY
GAIENNIE.

21	555
48	434

A bank taking a note before maturity as collateral security for money loaned, becomes the holder in good faith for a valuable consideration.

The pledgee of a promissory note payable to the drawer's own order and by him indorsed in blank may sue and recover on the note without the indorsement of the pledger.

APPEAL from the District Court, parish of Natchitoches. *Lewis, J. D. Pierson* and *C. F. Dranguet*, for plaintiffs and appellants. *Pier-son & Levy*, for defendant and appellee.

Howe, J. On the twentieth April, 1860, the defendant, for the accommodation of B. Toledano & Taylor, made his promissory note to his own order for the sum of \$10,956 56, dated at New Orleans, and payable three years after date, and indorsed the same in blank. On the thirteenth April, 1861, more than two years before the obligation matured, it was transferred to the plaintiffs, the Louisiana State Bank, as collateral security for three notes of Toledano & Taylor, amounting in all to \$35,000, and falling due in 1863.

The notes lastly mentioned being unpaid, the bank instituted suit thereon in New Orleans against Toledano & Taylor, but proceedings were stayed by the voluntary surrender of the latter. The syndic of Toledano & Taylor advertised and sold the note in suit, among others, subject to the rights of the pledgees, and the bank purchased it on the eighth June, 1867. The bank, however, had never given up the note to the syndic, but had already, on the twenty-eighth of March, 1867, instituted this suit upon it against its maker.

In his answer the defendant alleged that he made the note merely for the accommodation of Toledano & Taylor; that they transferred it to the plaintiffs, who had full knowledge of its character as to the respondent; that it was transferred to plaintiffs as collateral security for a discount granted to Toledano & Taylor; that the plaintiffs had brought suit and obtained judgment upon the principal obligation, and had collected the whole or a part thereof; that the note of defendant had been advertised for sale by the syndic of Toledano & Taylor, with the knowledge and consent of the plaintiffs, and that the title and ownership of the same had been retransferred to Toledano & Taylor, and the note being only accommodation paper, had become subject to the equities existing between the latter and the defendant.

There was judgment for the defendant, and the plaintiffs have appealed.

We have stated above the facts which are established by the record. The other allegations of the answer are not proved.

In view of these facts we are of opinion that the plaintiffs are entitled to recover.

In the first place, the very fact averred by the defendant, that he made the note for the accommodation of Toledano & Taylor is import-

ant. He desired to give them credit. He gave them the use of his name to the extent of the amount of the note, and thus enabled them to obtain credit. 7 Ann. 227. The note was then, as alleged in the answer, transferred to the plaintiffs as collateral security, and upon its faith a large discount was obtained, and the evidence shows that this transfer took place long before the note fell due. The plaintiffs thus became holders of the note in good faith, for value, before maturity.

It is contended by the defendant that inasmuch as the note in suit was not indorsed by Tolcmano & Taylor, the pledge to the bank was not valid under article 3123 of the Civil Code, which provides that "notification of the act of pledge to the person owing the debt pledged shall not be necessary, if the debt is evidenced by a note or other obligation payable to bearer or order, because in that case it will suffice if the note or obligation shall have been indorsed by the person pledging it, *to invest the creditor with the privilege above mentioned.*"

To this we reply that even if the defendant in this case, who has distinctly averred, in his answer, that the note was transferred to plaintiffs, can now question the validity of such transfer; and even if the article quoted has not been repealed by the sweeping provisions of the act of 1855, in reference to the pledge of negotiable notes, yet the article in question does not declare the nullity of the transfer of a note like the one in suit to a pledgee merely because the name of the pledger is not indorsed upon it. It merely declares that such indorsement shall invest the creditor with the privilege provided by article 3124, a privilege on the obligation as against the *other creditors of the pledger*. The liabilities of the maker of the note spring from the rules of commercial law. When, as in this case, the note drawn to the order of the maker is indorsed by him in blank, and before maturity transferred for value to the plaintiffs, the maker can not be heard upon a question which concerns only other creditors of the pledger. *Matthews v. Rutherford*, 7 Ann. 227.

It is further urged that the plaintiffs are not holders for value because they received the note as collateral security only; but the contrary doctrine is well settled. *Swift v. Tyson*, 16 Peters, p. 20; *Succession of Dollhonde*, 21 Arn. p. 3.

And in such a case as this, where there is no evidence that the principal obligation has been discharged even in part, the rights of the plaintiffs are for all practical purposes the same as they would have been if plaintiffs had purchased the note before maturity.

For the reasons given, it is ordered and adjudged that the judgment appealed from be avoided and reversed, and that the plaintiffs do have and recover from the defendant the sum of ten thousand nine hundred and fifty-six dollars and fifty-six cents, with interest at the rate of eight per cent. per annum from April 23, 1863, till paid, and costs in both courts.

Thompson Wood v. A. McCranie, Administrator, etc.

No. 189.—THOMPSON WOOD v. A. MCCRANIE, Administrator, etc.

21	557
105	804

An agent's right to compensation may be inferred from the nature of the services and the relations of the parties, without proof of an express agreement; yet to recover in such case the plaintiff must show some specific act performed in the capacity of mandatory before any implied contract for compensation can be established and form the basis of such recovery.

APPEAL from the District Court, parish of Bossier. *Wcems, J. L. B. Watkins and J. M. Jones*, for plaintiff and appellee. *W. B. Egan*, for defendant and appellant.

Howe, J. The plaintiff sued the defendant, as administrator of Winifred Wood, deceased, for the sum of \$1719 40, upon the following cause of action:

"For this, that petitioner boarded, furnished rooms, fires and servants, and riding horses, and a carriage, and all necessary attention to Winifred Wood in her old age, such as her almost helpless condition made necessary, and such as her possession of a handsome fortune required. That petitioner also attended to her business generally, such as securing her demands by taking notes, by taking care of her effects, all from December 20, A. D. 1856, to twenty-eighth May, 1860. For items and dates reference is made to the account hereto annexed as part of this petition."

No account, however, was annexed to the petition, and it does not, therefore, inform us how long the board was furnished, how many rooms, fires and servants were supplied, and for what time, or how many riding horses were used by this aged and almost helpless lady, or how many notes he took for her, or what and how many effects he took care of.

The defendant pleaded the general denial, and alleged that the intestate was in the family of the plaintiff as an invited guest, and not as a boarder; that she allowed plaintiff the use of her slaves and of her revenues and money to a large amount, and that if he ever attended to her affairs he did so gratuitously. He further averred that if the intestate ever owed plaintiff anything it had long since been paid, to wit, on the fourteenth April, 1860.

He afterward pleaded the prescription of one and three years.

There was judgment for plaintiff for \$1666 25, with interest on various installments, and defendant appealed.

The claim for board and lodging is prescribed, except that portion which accrued during the year previous to the commencement of the suit. The citation was served September 23, 1860, and the only portion of this claim which it is necessary to consider on its merits is that alleged to have accrued after September 1, 1859, about nine months, which, if the claim be real, is shown to be worth about eighteen dollars a month, or in all the sum of one hundred and sixty-two dollars. C. C. 3409; 2 A. 759; 5 A. 509; 3 A. 141; 3 A. 548.

But the family physician of the intestate, a witness for the plaintiff,

testifies that she died in 1858, and he would be likely to know more exactly than any of the other witnesses. The only matter in the record which seems to establish clearly that she was living in 1860 is a certified copy of a promissory note introduced by defendant, made by plaintiff to the order of Winifred Wood, and dated April 14, 1860, for \$1500, and intended to show that, at that time the plaintiff so far from being a large creditor of the intestate was in reality largely in her debt, and that this note was given as evidence of such debt. The plaintiff insists that this copy of a note proved nothing. If so, we must decide as matter of fact that Winifred Wood died in 1858, and that for board and lodging the plaintiff has no claim that has not been prescribed. If the evidence, on the contrary, shows that the plaintiff did make his note to the intestate in April, 1860, we must conclude that his whole claim is fictitious. In the absence of some explanatory evidence we cannot believe that the plaintiff would at that time have given his note at one year for \$1500 to a helpless old lady of fortune, who is proved to have had large amounts of ready money, if she had been indebted to him in a still larger sum, or in any sum.

The plaintiff sought to show by the testimony of a member of the bar that notes are frequently given without a settlement of pre-existing accounts; and that the parties to this note were "quiet country people not having much dealing commercially, and not familiar with legal rights in such matters." We think his testimony rather makes against the plaintiff. In the bustle of business, or for the accommodation of each other, merchants having large commercial dealings may make notes to each other's order, without a settlement of pre-existing accounts, but "quiet country people" are not apt to do so unless the maker of the note is indebted to the payee. What would this helpless old lady of large means and ready money be doing with the plaintiff's note, unless he was in her debt? We must confess that the assertion of the defendant's counsel that the claim in suit was fabricated in order to compensate this note is not without foundation.

The claim of the plaintiff for services as an agent is not established. One witness says the plaintiff acted as agent from 1851 or 1852 till said Wood's death, but he does not inform us of a single specific act of agency. He declares the agency was worth five hundred dollars per annum for the first five years, and three hundred dollars per annum for the last three years, but how he arrives at this conclusion is not apparent. He proves no employment by Mrs. Wood, no agreement, express or implied; he does not inform us of a single act ever done by the plaintiff to which the law would affix any presumption of usefulness or value. It is declared by the Civil Code, article 2960, that the procuration is gratuitous unless there have been a contrary agreement; and while, under the Code, which has modified the Roman law, it is not of the essence of mandate that it be gratuitous, and an agent's right to compensation may be inferred from the nature of the services, and the relations of the parties, without proof of an express agreement, yet it must be shown at least that some specific services were

Thompson Wood v. A. McCranie, Administrator, etc.

rendered in the capacity of agent before any implied contract for compensation could be established. 5 A. 672; 7 A. 207; 10 L. 508; 11 L. 226; 14 A. 317.

For the reasons given, it is ordered and adjudged that the judgment appealed from be annulled, avoided and reversed, and that there be judgment for defendant as administrator, with costs in both courts.

No. 149.—PAULINE LOTT AND HARRY LOTT v. WILLIAM MILLS AND SHERIFF.

Evidence to establish title is not admissible in a possessory action.

APPEAL from the Ninth Judicial District Parish Court of the parish of Rapides. *Wm. A. Seay*, attorney-at-law, selected to try recused cases. *R. A. Hunter*, for plaintiffs and appellees. *Ryan & White*, for defendants and appellants.

TALIAFERRO, J. The defendant, as executor of Edward Johnson, deceased, procured from the Parish Court an order of sale of a certain house and lot in the town of Alexandria, which, he alleges, belongs to the succession of Johnson, and was proceeding to have the property sold by the sheriff when the plaintiffs obtained a writ of injunction restraining the sheriff from making the sale.

The ground stated for the injunction is disturbance of the plaintiffs in the peaceable possession of the house and lot which they had enjoyed, as they allege, for a number of years, and which they had held and occupied as owners. Judgment was rendered in favor of the plaintiffs perpetuating the injunction and quieting them in their possession of the property seized. The defendant has appealed.

We find several bills of exceptions in the record, but do not deem it important to the decision of the case that they should be formally examined. The action is in its character essentially possessory. That is the true issue made up between the parties, and we think the ruling of the court rejecting evidence going to show title was correct. This exclusion of testimony of that character forms the subject matter of several of the bills of exceptions.

We seldom meet with a record so abounding in contradictory statements of witnesses as the one now under consideration. There is certainly a considerable amount of the plaintiffs' evidence to which we cannot attach much credit; still, we think that the question of possession is made out and that the judgment rendered in the lower court is correct.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs in both courts.

Rehearing refused.

R. T. Stinson v. W. H. Hill, Sheriff, et als.

No. 183.—R. T. STINSON v. W. H. HILL, Sheriff, et als.

An injunction will not lie to restrain the execution of a final judgment on the ground that the amount is erroneous.

The property of the surety on the official bond of the sheriff can not be seized and sold under a judgment against the principal and surety, until that of the principal has been discussed.

APPEAL from the District Court, parish of Bossier. *Levisce, J. Griffin & Snider*, for plaintiff and appellant. *Williamson & Turner*, for defendants and appellees.

HOWE, J. The appellant, plaintiff, was one of the sureties upon the bond of L. F. Steel, sheriff of Bossier parish. In August, 1867, final judgment was rendered by this court against the administrator of Steele, and against Robert T. Stinson and Austin Martin as sureties *in solido*, in favor of Taylor, Knapp & Co., for the sum of \$631 78, with interest at eight per cent. per annum from March 30, 1853, till paid. See *Taylor v. Hancock*, 19 Ann. 463.

Execution was issued on this judgment, and placed in the hands of the defendant, Hill, for enforcement. The property of the plaintiff, Stinson, being thereupon seized, he procured the injunction now before us, upon the grounds, *first*, that the amount demanded in satisfaction of the writ exceeded in capital and interest the sum of one thousand dollars, to which amount he had limited his liability on the bond; and *second*, that the bond having been recorded in compliance with law, January 7, 1863, operated as a mortgage upon the property of Steele, and that by law Taylor, Knapp & Co. could not, under the judgment upon this bond, make any sale of the property of the sureties until that of the principal, Steele, had first been discussed. The petition set forth certain property of the succession of Steele, from which it was averred the judgment might be satisfied. The answer was a general denial. There was judgment in the court below dissolving the injunction, and plaintiff has appealed.

The first ground urged for the injunction is insufficient at this time. It should have been pleaded, if at all, before the judgment, the execution of which is sought to be restrained, was rendered. The judgment of August, 1867, is final, and its amount can not now be diminished. The court below, therefore, properly refused, as appears by a bill of exceptions, to permit inquiry into the amount for which the plaintiff was originally liable upon the bond.

But the second reason for the injunction has more force. It appears by a bill of exceptions that the plaintiff offered evidence to prove that there was sufficient unencumbered property belonging to the succession of Steele, which plaintiff pointed out in his petition, to satisfy the execution enjoined; but that the court, upon the objection of defendants, excluded the testimony.

We are of opinion that there was error in this ruling. The plaintiff

R. T. Stinson v. W. H. Hill, Sheriff, et al.

was not urging a defense that could have been pleaded only in the action in which the judgment of August, 1867, was rendered; nor was he attempting to review or revise that judgment. He was merely striving to regulate its execution in accordance with the law upon the subject. The statute provides that whenever an execution shall issue upon a judgment rendered upon a bond like the one in question, it shall be lawful for the officer to whom it may be directed to seize and sell according to law any lands which may have belonged to the principal obligor at the date of the registry of his official bond, without regard to any subsequent transfer or change of title, and in whatever hands the same shall be found—and that no sale shall be made of the property of the sureties until that of the principal shall have been discussed. R. S. 1856, pp. 67, 63. This law seems to be imperative in its provisions, and to prescribe a method of executing the judgment in this case from which no deviation should be permitted.

For the reasons given it is ordered and adjudged that the judgment appealed from be avoided and reversed, and that the cause be remanded for a new trial, and to be proceeded with according to law, and that the appellees pay the costs of the appeal.

No. 159.—CARROLL, HOY & CO. v. MRS. ELIZA HUIE, Executrix.

To maintain an action by a creditor to remove an executrix from office, the party must allege that he is a creditor of the succession. The allegation that he is a creditor of the executrix or the heirs is not sufficient. C. P. 1018.

APPEAL from Parish Court, parish of Rapides. *Barlow*, Parish Judge. *R. A. Hunter*, for plaintiffs and appellants. *H. S. Losec*, for defendant and appellee.

WYLY, J. Plaintiffs seek to remove the executrix of the succession of Josiah Huie (claiming to be judgment creditors of her individually), on the ground that she moved to Texas with a view to reside there permanently without having rendered her account, and also because she sold at private sale a considerable amount of personal property belonging to said succession, and appropriated the proceeds thereof to her individual use.

They further represent that since the removal of Mrs. Huie the remaining property of said estate has been in the possession of persons not authorized by law to represent said succession, and consequently not responsible to the creditors either of Mrs. Huie or of the succession of Josiah Huie for their acts, and in consequence thereof they greatly fear that the remaining property will not be enough to pay the debts due by the estate, and leave sufficient community property belonging to their debtor, Mrs. Huie, to pay their judgment against her.

To this suit Mrs. Huie filed her peremptory exception that the plaintiffs do not allege that they are creditors or have any claim against the

succession of Josiah Huie, represented by her as executrix, and their petition shows no cause of action.

The court maintained the exception dismissing the suit, and the plaintiffs appeal.

The plaintiffs reserved a bill of exceptions because the court refused to receive proof on the trial of the exception that they are judgment creditors of Mrs. Huie individually.

This is quite immaterial, as they made that allegation in their petition, and for the purpose of trying the exception, that no cause of action is shown, the allegations are taken as true.

The removal of curators of vacant estates and absent heirs, and that of testamentary executors or other administrators of successions, may be prayed for by any heir, creditor or other person concerned, etc. Code of Practice, article 1018.

This we understand to be the legal designation of what persons can sue to remove the legal representatives of successions.

Articles 1016 and 1019 of the Code of Practice authorize the judge, when made acquainted with any facts sufficient to justify a removal, to direct the subrogated tutor, or the curator *ad lites*, or the counsel of the absent heirs to institute a suit in their name to obtain the removal.

Under the articles last referred to, surely, the plaintiffs have no cause of action. They are not suing under the direction of the judge, and they are not such as he could direct to bring the action.

Are they such persons as are designated under article 1018? We think not. They are not heirs or creditors, or in any manner concerned in the succession of Josiah Huie. That they are judgment creditors of the heirs or the widow of the deceased, or those who have only a residuary interest, does not give them sufficient interest in this succession to authorize the suit.

Mrs. Huie does not occupy a fiduciary capacity toward the plaintiffs, who only claim to be individual creditors, and she cannot be proceeded against by them as an unfaithful agent. They can not sue under article 1018, which permits the heirs, creditors or those directly concerned in a succession to pray for the destitution of its unfaithful representative.

It is therefore ordered that the judgment appealed from be affirmed with costs.

O. K. Hawley v. J. H. C. Barlow.

No. 138.—O. K. HAWLEY v. J. H. C. BARLOW.

The act of the Legislature of 1869, No. 110, entitled "an act to amend and re-enact sections four and nine of an act entitled an act to organize the parish courts of this State," etc., in authorizing clerks of district courts to perform clerical duties of the parish courts, and receive the fees therefor, does not create the office of clerk of the parish court, and is therefore not in violation of article 117 of the constitution, which provides that no person shall hold or exercise, at the same time, more than one office.

The ninth section of the act of 1869, No. 110, in providing that the parish judges shall receive a salary and such fees as are allowed to clerks of district courts in all cases of appeals from justices of the peace, does not violate that part of article eighty-six of the constitution, which declares that parish judges shall receive a salary and fees, to be provided by law.

APPEAL from Ninth District Court, parish of Rapides. *Orsborn, J. M. Ryan*, for plaintiff and appellee. *White & Manning*, for defendant and appellant.

WYLY, J. The plaintiff, who is clerk of the District Court of the parish of Rapides, has enjoined the defendant, who is parish judge of said parish, from taking the custody of the records of the parish court and from performing the clerical duties of said court and collecting the fees provided by law therefor, except the fees arising from appeals from the justices courts. The court rendered judgment in favor of plaintiff, perpetuating the injunction, and the defendant has appealed.

The facts are admitted. Plaintiff's claim to the custody of the records and to perform the clerical duties and receive the fees, is based on the act of 1869, No. 110, entitled "an act to amend and re-enact sections 4 and 9 of 'an act entitled an act to organize the parish courts of this State, and fixing the duties of sheriffs and clerks, providing penalties for their failure to discharge their duties, fixing seal for the clerk of the District Court, and providing a salary for the parish judges and giving the parish courts jurisdiction of suits for separation of bed and board and divorce and interdiction suits, approved September 4, 1868, and authorizing clerks of courts to issue marriage licenses, and fixing the fees to be allowed parish judges.'"

The defendant contends, the provisions of this act authorizing the district clerk to perform certain clerical duties and receive certain fees in the parish court, virtually creates the office of parish clerk, designating the district clerk to perform its duties in violation of article 117 of the State constitution, which declares that, "no person shall hold or exercise at the same time more than one office of trust or profit, except that of justice of the peace or notary public."

He also contends that said act violates article 86 of the constitution, which provides that, "for each parish court one judge shall be elected by the qualified electors of the parish. * * * He shall receive a salary and fees, to be provided by law. Until otherwise provided, each parish judge shall receive a salary of one thousand two hundred dollars per annum, and such fees as are established by law for clerks of district courts."

The fourth section of this amendatory act declares that there shall be no clerk of the parish court. It, however, provides that, "the

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clerks of the several District Courts of this State shall perform all the clerical duties to be performed in and for the parish courts. * * * That for such services said clerk of the District Court shall have such fees as are now or may hereafter be provided by law for such services." * * * It further provides that, "this section nor any provision in it shall not apply to any proceedings in cases of appeals from justices of the peace courts to the parish courts; in all such cases the parish judge shall be his own clerk and issue all such orders and writs of any kind pertaining thereto, and shall be entitled to all fees resulting therefrom." * * *

We cannot perceive that this act creates the office of parish clerk as urged by the defendant. It states expressly "that the parish court shall not be entitled to a clerk of the parish court."

"When a law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Civil Code, article 13.

If the act did not create the office of parish clerk it is not in conflict with article 117 of the constitution, by requiring the district clerk to perform the duties named in the act, and receive the fees.

The ninth section of the act under consideration provides, "that the parish judges shall have a salary, payable quarterly on their own warrants on the State Treasurer, graduated as follows:

"In parishes having one member, or new parishes not yet entitled to separate representation in the House of Representatives, two thousand dollars; in parishes having two or more members in the House of Representatives, two thousand five hundred dollars; and they shall further be entitled to the fees which are provided for clerks of courts in all cases of appeals from justices of the peace courts to the parish courts and no other." Acts of 1869, 140, 142.

The defendant contends that this section violates that part of the eighty-sixth article of the constitution which declares that the parish judge shall have a salary and fees to be provided by law.

Can we say that the amendment to the act organizing the parish court, has not provided a salary and fees for the parish judge? Surely not. Both a salary and fees are provided. In its discretion the Legislature has increased the salary and diminished the fees, and in so doing we cannot say the eighty-sixth article of the constitution has been violated.

The defendant urges that the act of 1869 was passed to evade the decision of this court decreeing certain parts of the act of 1868 unconstitutional.

We cannot presume that the Legislature in passing this act intended to violate the constitution which they have sworn to support.

We will only declare an act unconstitutional when it is manifestly so. 3 M. 12, 553; 3 N. S. 472; 4 N. S. 139; 5 R. 383; 8 R. 416; 5 A. 756; 8 A. 341; 11 A. 722.

It is therefore ordered that the judgment appealed from be affirmed with costs.

Eugene R. Blossat, Tutor, v. John S. Sullivan.

No. 143.—EUGENE R. BLOSSAT, Tutor, v. JOHN S. SULLIVAN.

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A sale of community property by the husband, after the death of the wife, only conveys title to one undivided half thereof.

An agreement to sell, where the consideration is shown to be Confederate treasury notes, will not be enforced.

APPEAL from the Ninth District Court, parish of Rapides. *Edward C. Leckie* (attorney at law), selected to try recused cases. *Manning*, for plaintiff and appellee. *Ryan & White*, for defendant and appellant.

LUDELING, C. J. This is an action to recover a lot of ground in the town of Alexandria, designated as lot number four, in square number one.

The defendant alleges in his answer that he purchased the lot from Adolphe Rachal, the father of the minors, represented by Blossat, tutor; that he gave seven hundred and fifty dollars for it; that Rachal promised to transfer the property in writing, but that he never did so. He prayed to be adjudged the owner of the lot, or that he have judgment against the heirs of Rachal for the price paid.

The evidence shows that the lot in question was acquired by Rachal during the community existing between himself and his wife, and that, at the period when, it is alleged, he sold the lot to the defendant, Mrs. Rachal had died. The undivided half of the lot, therefore, belonged to her children. The evidence does not satisfy us that Rachal sold the lot to the defendant. John Osborne, the witness of the defendant says: "I drew up the title and went to Mr. Rachal on the St. Nicholas and asked him to sign it, *which he refused to do.*" We attach little importance to the *declarations* of Rachal, who is now dead. Jacob Irving, another witness for defendant, seems to know little about the transaction, except what Sullivan, the defendant, told him. Notwithstanding, he says, Rachal promised to make a title, when he received the money. It is difficult to conceive why he did not make the written title then, if he had sold the lot.

Another witness testifies that Sullivan bought an old warehouse, which was on the lot, and that it was agreed at the time, that the house should be removed from the lot, and that the house was torn down and carried away in accordance with the agreement. If Sullivan bought the lot, why the agreement about taking the house away? If the house and lot belonged to him, he could have removed the house or not without any agreement.

If full effect be given to the testimony of the witnesses for the defendant, and the evidence of the plaintiff be disregarded, it would only prove an agreement to sell, or executory contract, and the consideration was Confederate treasury notes. It is well settled that this court will not aid parties to enforce a contract which had Confederate notes for a consideration.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, and that the appellant pay the costs of the appeal.

W. C. James, Administrator, v. R. C. Hynson and Sheriff

NO. 158.—W. C. JAMES, Administrator, v. R. C. HYNSON and SHERIFF.

An heir, of age, by accepting the succession, purely and simply, becomes personally liable for the debts of the estate. C. C. 1006.

A creditor who permits the heir to take unconditional control of the estate, without causing it to be administered, loses the right to pursue the property of the succession, as distinct from that of the heir.

APPEAL from the District Court of Rapides. *Orsborn, J. Ryan & White*, for plaintiff and appellee. *R. A. Hunter*, for defendant and appellant.

HOWELL, J. Mrs. M. J. Calvit, a married woman, separate in property, died in 1862, leaving one child, named William N. Calvit, the issue of her marriage with J. A. Calvit, who died in 1865. This son, after the death of his father, continued to reside on the plantation, the property of his mother at her death, and which the evidence shows he managed from the time of her death as his own property, creating debts and giving mortgages upon it as early as March, 1867. On the twenty-third May, 1866, he confessed judgment in favor of the defendant, R. C. Hynson, which was recorded on sixteenth November, 1866.

In September, 1863, W. C. James was appointed and qualified as administrator of the succession of Mrs. M. J. Calvit, of which an inventory was taken in July preceding, containing only the said plantation, as the property of the succession.

James, now, as such administrator, institutes this suit to enjoin the sale of said property, seized by the sheriff in the suit of R. C. Hynson v. W. N. Calvit, alleging that the said succession owes debts, and among others, one of \$1200 to the succession of P. M. Henderson, and that the property seized is the only property left to pay them and does not belong to W. N. Calvit, but to the succession of Mrs. M. J. Calvit, his mother—his interest therein being only residuary.

This injunction was improperly perpetuated.

The heir, by accepting the succession, purely and simply, received it with the debts due by his mother. Her creditors, not having claimed a separation of patrimony, or caused her succession to be administered in due time, have lost their right to pursue her property as distinct from that of the heir, who has become their personal debtor, and the property inherited by him has become liable to the debts of his own creditors. C. C. 1006, 1370, 1398, 1409.

The plaintiff in this case had not, therefore, any legal right to interfere with a more vigilant creditor of the heir. The judgment enjoined is for \$2049 19, with eight per cent. interest from fourteenth April, 1866.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment in favor of the defendant, R. C. Hynson, dissolving the injunction herein, and that the plaintiff and his surety, Thomas Neal, be condemned, *in solido*, to pay said defendant twelve per cent. on the amount enjoined, as damages, with costs, in both courts.

Edward Groves v. K. M. Clark and R. H. Carnal.

No. 139.—EDWARD GROVES v. K. M. CLARK and R. H. CARNAL.

A third holder of a promissory note, given for the price of a slave cannot recover thereon, although he acquired the note in good faith, for a valid consideration, before maturity. Constitution of 1868, article 128. *Wainwright v. Bridges*, 19 An. 234.

A PPEAL from the Ninth Judicial District Court, parish of Rapides. *Edward C. Leckie* (attorney at law). presiding, vice *Orsborn*, recused. *Edward Groves*—plaintiff in person, appellant, *Manning*, for defendants and appellees.

TALIAFERRO, J. The defendants are sued upon a promissory note for \$2225, dated January 4, 1859, made payable two years after date to the order of John H. Ransdell, tutor to the minor heirs of Austin W. and Harriet X. Burgess, and stipulating the payment of interest at eight per cent. per annum from maturity. Partial payments seem to have been made upon the note, and the credits indorsed.

The defense is, that the sole consideration of the note was the purchase of slaves, which being emancipated and their services lost to the defendant, he is under no obligation to pay the note.

Judgment was rendered in favor of the defendants and the plaintiff appeals.

The facts of the case are that Kenneth M. Clark, the principal debtor, bought at a succession sale of Austin W. and Harriet X. Burgess on the fourth of January, 1859, five slaves at the price of \$8900, of which he paid in cash \$2225, and executed his three several promissory notes each for two thousand two hundred and twenty-five dollars, with Carnal the other defendant as his surety *in solido*, and executed a mortgage on the slaves purchased to secure the payment of the notes. The note sued upon is one of a series of three executed for the payment of the price of the slaves.

The plaintiff establishes that he acquired the note on which he founds this suit before its maturity. It seems that he took it in part payment for an interest of his brother, William P. Groves, in a drug store.

The article 128 of the State Constitution forbids the enforcement of obligations entered into for the payment of the price of slaves. But it is contended that this provision of the State Constitution does not apply in cases where obligations having that character and in the form of negotiable notes are transferred before their maturity to third parties. The plaintiff alleges that he is a *bona fide* holder before maturity, and that as between himself and the maker of the note the consideration cannot be inquired into.

We propose to examine cursorily the stress which is given in argument to the changed relations of parties arising from the transfer of a negotiable instrument by indorsement. Every indorsement is said to be equivalent to a new drawing. The contract between the payee and the indorsee is a new and different contract from that between the

maker and the payee. But does not this new and different contract inevitably connect and complicate itself even with the essential parts of the first contract? A sells slaves to B, and B executes his negotiable promissory note for the payment of the price, say at twelve months from the date of the transaction. Before its maturity, A transfers the note to C, to pay for a lot of mules he bought from him. What is the purpose of the parties to this new contract? B's obligation is transferred to C in order that A may get the mules, and C gives the mules to acquire that obligation, and the right to enforce it. The consideration then for which C parts with his mules is identical with that for which A parted with his slaves, namely, the price of the slaves which B had obligated himself to pay to A. It follows then that C *did* contract for an illegal obligation and for the right to enforce that illegal obligation, whether he knew it or not. He contracted for an obligation reprobated by law and forbidden to be enforced. But by the rules of the law merchant he would be protected as an innocent holder for value before maturity and without knowledge of equities or exceptions that might exist between the original parties. But is the commercial law paramount? Certainly not. It prevails, so far as not modified, limited or altered by statutory or constitutional provisions. This we hold is now the case in Louisiana as regards obligations of every kind and in every form which have been entered into for the payment of the price of slaves. Article 128 of the State Constitution is couched in clear and unambiguous language. Its terms are unequivocal: its expression imperative. "Contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State."

In the face of this paramount authority so plainly enunciated, can the courts of this State enforce contracts which it reprobates, whether the holder of the obligation is in good or bad faith, or a holder before or after maturity? The positive prohibition of the article 128, makes no exception in favor of one class of holders over another. Shall the courts make such an exception? This sanctity by the mercantile law of the rights of a *bona fide* holder before maturity is not recognized by the Constitution of the State *quoad* the contracts it repudiates. Its meaning is that *all* contracts for the sale of persons are null and void. Can this mean that *some* contracts for the sale of persons are null and void, and other contracts of the same kind valid? Or, rather can it mean that contracts for the sale of persons shall be null in the hands of certain parties, but valid in the hands of other parties? If an obligation for the payment of the price of slaves in the hands of a third holder before maturity can be enforced, then there are some contracts for the sale of persons that are not null and void. Where is the logic of such a conclusion? None dispute that obligations of the sort in question are by the terms of the article 128 of the Constitution utterly and absolutely null and void in the hands of the original parties. If

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thus stricken with nullity what is to revive and give them validity? We hold the purpose of article 128 of the Constitution of the State to be clear and without doubt, and that that purpose is, that the contracts which it reprobates shall be null in whose hands soever they are found, and that the courts are forbidden to enforce them whether held by owners *bona fide* or *male fide*, and without reference to the time they acquired them.

But if the meaning and intention of that article of the Constitution were not clear and explicit, and it were a matter of inference and deduction, how would the case rest? Suppose a legislator should announce by a formal statute that all contracts, the consideration of which were the commission of murder, should be null and void, and that the courts should not enforce them. What construction would rationally be given to the statute? Could it be limited to contracts of that character to apply as between the parties only? If so, the legislator would have done a very vain and a very useless thing, for by laws already existing no contract of that kind could be enforced between the original parties. The statute so construed would practically be nugatory. Then the interpreter would be required to give it some meaning and force, if it were susceptible of it, beyond the previously existing laws on the same subject matter. *Magis res valeat quam pereat*. He could not, according to established rules of construction, conclude that the legislator intended to do so jejune and meaningless a thing as that of merely enacting a law which was already enacted. This would be absurd. He must then, if the terms of the statute would admit of enlargement, give it that enlargement as the purpose of the legislator, and decree the nullity of the reprobated contracts against all parties and under all circumstances. Now under the hypothesis that the meaning of article 128 of the State Constitution is not free from doubt, let us apply this process of reasoning for the purpose of determining that meaning. By the decision in the case of *Wainwright v. Bridges*, 19 An. 234, followed by many decisions affirming it, it was fully settled that contracts for the payment of the price of slaves were null, and that the courts could not enforce them. These decisions were the settled law of the State before the adoption of the Constitution of 1868. There was then no call for the insertion of the article 128 in that Constitution if the framers of the organic law did not intend to assert more broadly the doctrine of the *Wainwright* case than was announced in that decision, and to leave no question as to their intention to render null and abortive in the hands of any holder whatever all obligations of the kind treated of in the one hundred and twenty-eighth article. We accept that article as being clear and explicit on the subject, and as necessarily overruling the case of the *Canal Bank v. Templeton*, 20 An. p. 141, decided before the adoption of the Constitution.

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It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

LUDELING, C. J. The only obligation contracted by the maker of the note sued upon was to pay the amount thereof.

This is the obligation which we are called upon to enforce.

The record shows that this contract was for the sale of persons, and the Constitution of this State forbids the enforcement of such contracts by the courts.

For the reasons given in the case of Charles F. Dranguet, administrator v. E. Rost, 21 An., and the reasons stated in the opinion of Mr. Justice Taliaferro, I concur in his conclusions.

HOWELL, J. As the proof in this case shows that the contract into which the defendant entered, and the consideration of which is evidenced or represented by the note sued on, is one for the sale of persons, it cannot be enforced under the Constitution, which controls the rules of the law merchant, established in the interest and for the convenience of commerce.

For this reason and those assigned in the case of A. Armstrong v. T. Lecomte No. 1291, I concur in the decree.

WYLY, J. I think the obligation between the indorsee and the maker of the note sued on, cannot be enforced without enforcing the original contract.

If the maker is forced by the court to discharge his obligation to the indorsee he is necessarily forced to discharge the contract he has made with the payee, which was for slaves.

This we cannot do without violating article 128 of the Constitution.

For these reasons and those given by Mr. Justice Taliaferro, I concur in the decree of the court.

HOWE, J., *dissenting* :

The record in this case clearly shows that the note in suit was indorsed by its payee to one Burges, who in turn indorsed it in blank, and transferred it for value and before maturity to the plaintiff, who took it in good faith. The note itself bears upon its face no *indicia* of its origin. It is not even paraphed.

With such facts apparent and unquestioned, I find it impossible to

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concur in the opinion which has been delivered on behalf of a majority of the court.

It is hardly necessary to say that I do not propose to take ground in favor of enforcing "contracts for the sale of persons."

The jurisprudence of the State in this regard is settled; and the prohibition of the Constitution is plain and must be respected and obeyed. But it is difficult to perceive how the giving of judgment in this case, in favor of the plaintiff, can be considered in law the enforcing of a "contract for the sale of persons."

It is true that the consideration or cause of the contract between the makers and payee was the sale of slaves, and upon the authority of *Wainwright v. Bridges*, 19 Ann. 234, and many succeeding cases, this court would decline to enforce the note as between the original parties, and would point to the one hundred and twenty-eighth article of the constitution as a recognition and confirmation of the principles enunciated in those decisions. But it by no means follows that the contract between the makers of the note in suit and the plaintiff is a contract for the sale of persons, or that the sale of persons had any legal connection whatever with it.

On the contrary, I apprehend that the contract between the makers of the note in suit and the plaintiff was that of the acceptor of a bill drawn by Burges, the second indorser, upon the defendants in favor of the plaintiff, in payment for half a drug store. I believe all writers agree in this view, that the indorser of a note may be looked upon as a drawer of a new bill, the indorsee as the payee thereof and the original maker of the note as the acceptor, and this is essentially a new contract. *Hill v. Martin*, 12 M. 183, and cases there cited; 7 L. 498; 11 R. 497; 9 M. 194.

If, therefore, to give judgment for the plaintiff in this case would be to enforce any contract of sale, it would be a contract for the sale of half a drug store, and not for the sale of persons.

Suppose A, desiring the death of his neighbor, makes his note to the order of B, a hired assassin, and B transfers the note to C, who indorses it in blank and before maturity pays it to D for a pew in church. The innocent indorsee for value brings suit against A. It is clear that contracts to procure and commit murder are "null and void and shall not be enforced by the courts of this State;" and this provision is as imperative as if it formed an article in our Constitution. Their nullity is absolute, being founded on considerations of public order and good morals. Their execution is perpetually resisted by the law. But would A be listened to if he should say that D must not recover lest an agreement to do murder should thus be enforced. I think not. For it would not be the contract to procure assassination, or the contract to do murder, that would in such case be enforced; but that other obligation, that the maker, as acceptor of a bill drawn by C, in

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favor of D, in payment for a pew in church, would pay D the amount of the bill.

It is true that the law may declare a note void in the hands of even the innocent indorsee, though the spirit of modern civilization is opposed to such enactments, and if the one hundred and twenty-eighth article of the Constitution declared that notes like the one in suit should be void in the hands of a party like the plaintiff I could not urge the views above expressed. But the Constitution does not so declare. It declares the nullity of contracts for the sale of persons, It embeds in fundamental law the doctrine of *Wainwright v. Bridges*, a suit between the original parties to a slave note. But I must confess my inability to see how, either directly or by implication, it forbids the enforcement of a bill drawn in favor of the plaintiff in this case, in consideration of the sale of half a drug store, and in the eye of the law accepted by defendants.

In the case of the Canal Bank v. Templeton, 20 Ann. 141, decided about one year after the case of *Wainwright*, the defendant was sued upon his promissory notes given for the price of slaves. The defense was set up, as in this case and the consideration proved. But the court in a unanimous opinion said:

"We are satisfied from the evidence in the record, which is not rebutted, that the plaintiff is the *bona fide* holder of the notes sued on, indorsed and transferred to it previous to their maturity for a good consideration, without notice, and that no want of consideration, even by the emancipation of slaves or otherwise, between the original parties, can be urged against the plaintiff."

And the judgment given against the defendant was affirmed.

This decision was rendered in February, 1868, prior to the adoption of the present Constitution; but shall it be said that the judges who rendered it thereby enforced a "contract for the sale of persons," and that they would have gone on enforcing such contracts if they had not been checked by article 128 of the new Constitution? I trust not. I must still believe that the constitutional provision does not apply to the case at bar.

The same considerations seem to furnish a reply to the statement that the plaintiff cannot recover because the note as a contract was smitten through with nullity or *destroyed* by the destruction of slavery. Admit this nullification or destruction, is the note any less valid than one which is null and void *ab initio*? The plaintiff is the holder of a note which, as a contract between the maker and payee is said to have been destroyed, by war, by proclamation, and by constitutional amendment. Another man is the holder of a note, which, as in the illustration I have used, was given as the price of blood, and was, between maker and payee, originally and always, a mere nothing. Yet the latter we are told shall recover and not the former. I am unable to

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perceive a reason for this discrimination. Grant that the contract between the maker and payee of the note in suit was without consideration, or grant that its consideration was immoral and unjust; grant that this consideration and this contract have been swept away, still that other agreement by the makers to pay the bill drawn upon them by the indorser, Burgen, in favor of the plaintiff, remains untouched. Its consideration, the sale of half a drug store, was lawful and it ought to be enforced.

If this theory of the case be deemed fanciful, it may be laid aside without injury to the plaintiff's rights. All will agree that as *bona fide* holder for value, and before maturity of a promissory note, he must recover unless the note has by law been declared to be void even in such hands as his. Have we any statutory or constitutional provision making such a declaration? I find none. It is not claimed that there is such a statute. Does article 128 of the Constitution make such declaration? By no means. It declares contracts for the sale of persons to be null and void. The note in suit is not a contract for the sale of persons, or for the sale of anything. It is only avoided by implication, as an evidence of a debt incurred by a purchase of persons. But this implication ought not to involve any party but the payee, who was a party to the sale. If the article declared that promissory notes given for the price of persons should be null and void even in the hands of third and innocent parties, the case would be different, but it makes no such provision.

But if the intent and effect of the article is to avoid the note in suit in the hands of plaintiff, the article itself is null and void, being in conflict with the Constitution of the United States which declares that no State shall pass a law impairing the obligation of contracts. I prefer to adopt a construction which will not bring the makers of our Constitution in direct conflict with the supreme law of the land.

For these reasons I am of opinion that the plaintiff should have judgment.

No. 176 —M. MILLER v. WILLIAM BEDELL et als.

The specifying of some of the ways by which a party has been imposed upon and deceived does not preclude the petitioner from giving evidence of other acts of deception under the general allegation of fraud.

A PPEAL from the District Court, parish of Caddo. Taylor, J., vice Levison, recused. A. W. O. Hicks, for plaintiff and appellee. J. W. Duncan and C. C. Henderson, for defendants and appellants.

LUDELING, C. J. This is an action to annul transfers of real estate situated in the city of Shreveport, on the ground of fraud.

The defendants moved to dismiss the suit in the District Court so far

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as it affects the title to lot nine, on the ground that the plaintiff had parted with her title to this lot since the institution of this suit. The sale is conditional only, and the event upon which it depended had not happened and could not happen until the final decision of this cause.

The exception was correctly overruled.

The defendants took a bill of exceptions to the ruling of the judge *a quo* admitting evidence to prove knowledge by Sartin & Bayless of the fraud of Bedell and their complicity with said Bedell on the grounds that no "specific act of fraud is charged against them, and no general allegations of fraud or knowledge of fraud is alleged against them.

We think the pleadings of the plaintiff and defendants, taken together, sufficiently presented the issue of fraud as to all the defendants. The answers of the defendants show that they understood that to be the issue in the case. They were not surprised by the evidence, and should have been prepared to rebut it, if they could. We think the court *a qua* correctly received the evidence.

The defendants took another bill of exceptions to the ruling of the District Judge admitting evidence to prove other or different *acts* of fraud from that alleged in the petition, on the ground that it was irrelevant and inadmissible under the pleadings. The allegations of the petition are that the deed was procured by "misrepresentations and fraud;" that the plaintiff had been "imposed upon and deceived," and that she had been "defrauded and cheated." Specifying some of the *ways* by which defendant, Bedell, had imposed upon her, did not prevent proof of other acts tending to establish fraud.

Defendants took a third bill of exceptions to the ruling of the judge refusing to sustain the exception of defendants to the action. It is unnecessary and irregular to retain bills of exceptions to such interlocutory orders.

We have already affirmed the correctness of the ruling of the judge on this exception. It is not necessary to notice the bills of exceptions taken by the plaintiff.

On the merits, we see no reason for disturbing the judgment of the court *a qua* based on a verdict of a jury.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs of appeal.

No. 4.—STATE OF LOUISIANA v. A. JACKSON, E. SMITH et al.

ON REHEARING.

The statute of the State of Louisiana of 1855, authorizing prosecutions by the District Attorney on information, is not in conflict with the fifth amendment to the Constitution of the United States, which declares "that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury." The restriction by this amendment to the Constitution of the United States has no application to the State courts.

APPEAL from the Ninth District Court, parish of Rapides. *Lewis, J. Pierson*, District Attorney, appellant. *M. Ryan*, for defendants and appellees.

State of Louisiana v. A. Jackson, E. Smith et al.

WYLY, J. The State has appealed from a judgment rendered in favor of the defendants, quashing a bill of information, in which they are charged with an assault with intent to murder James M. Hays.

The proceeding was excepted to on the ground that the crime charged being infamous could not be prosecuted by bill of information, but could only be by indictment or presentment of a grand jury, according to the fifth amendment of the Constitution of the United States, which says that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury. * * *

There is no pretense that the form of the prosecution is irregular or contrary to the constitution and laws of this State, but it is contended that the act of 1855, and the constitutional provision of this State authorizing the proceeding, are both in violation of the article of the Constitution of the United States referred to, and consequently null and void.

To this proposition we cannot assent.

This court has often recognized the validity of prosecutions of this character. *State v. McGinnis*, 12 A. 743; *State v. Kerr*, 13 A. 243; *State v. Mullen*, 14 A. 570.

In the *State v. Ross* (14 A. 364), where the grand jury had refused or failed to present an indictment, it was held that the State was not barred, and the prosecution by bill of information could be maintained.

The law upon which the bill of information is founded is not violative of the fifth amendment of the Constitution of the United States.

It is now settled that this amendment of the Constitution of the United States does not extend to State courts; it is exclusively a restriction upon Federal power, "intended to prevent interference with the rights of the States and of their citizens." *Fox v. Ohio*, 5 How. 434; *Livingston's Lessee v. Moore*, 7 Pet. 551; *Barron v. Mayor of Baltimore*, 7 Pet. 243.

It is therefore ordered that the judgment appealed from be annulled; that the motion to quash be set aside, and that the cause be remanded, to be proceeded in according to law, the defendants paying costs of appeal.

No. 146.—NORTON & MACAULEY v. JOHN O. PICKENS.

A commercial firm holding a note in favor of one of its members without indorsement, given for money loaned by the firm, can not set up that they are innocent third holders for value against the plea of failure of consideration.

APPEAL from the District Court, parish of Rapides. *Lewis, J. R. A. Hunter*, for plaintiffs and appellees. *Ryan & White*, for defendant and appellant.

Norton & Macauley v. John O. Pickens.

Howe, J. This suit was instituted on a promissory note for \$5000, made by defendant to the order of Alexander Norton, one of the plaintiffs' firm, dated July 14, 1862, and payable twelve months thereafter.

The defense was that the note was given by defendant for a loan of Confederate States treasury notes.

The case was tried before a jury, who gave a verdict for plaintiffs for \$3383 33, and from the judgment rendered upon this verdict, the defendant has appealed.

The evidence sufficiently establishes the fact that the note was given for a loan of Confederate money. The consideration was illegal and void, and the judgment must be annulled. 19 Ann. 161, 164, 257, 283, 359; Constitution, article 127.

It is contended by plaintiffs' counsel that they are *bona fide* holders, for value and before maturity, and can not, therefore, be affected by the illegality of the consideration as between the maker and the payee. But we do not thus understand the facts. Alexander Norton, the payee, was one of the plaintiffs' firm, the loan for which the note was given was made by plaintiffs' firm to the defendant, and the note described in the petition and copied in the record was not indorsed, and therefore never transferred by Alexander Norton to the plaintiffs, Norton & Macauley. It is apparent, then, that Alexander Norton, when he became payee of the note, became such on behalf of the plaintiffs as part of the transaction in which the loan was made by the latter.

For the reasons given, it is ordered and adjudged that the judgment appealed from be avoided and annulled, and that the suit be dismissed at plaintiffs' costs.

No. 184.—Succession of E. H. POMEROY. Opposition of C. V. HUNT.

The allegation of a married woman in her petition that she is "joined and authorized" by her husband, is not sufficient authority to enable her to prosecute the suit.

A married woman can only appear in court with her husband appearing also, or by showing his authorization otherwise than in her own averments.

APPEAL from Parish Court, parish of Caddo. *Creswell*, Parish Judge. *Nutt & Leonard*, for opponent and appellant. *T. T. Land* and *George Williamson*, for executor, appellee.

WYLY, J. A motion is made to dismiss this appeal because it has been taken by the appellant, who is a married woman, without the authorization of her husband.

We do not find any evidence in the record of her husband's authorization either to take this appeal, or to prosecute the suit in the lower court.

In her petition of opposition, in her motion for appeal and in her appeal bond she states that she is "joined and authorized" by her husband, but the latter has not joined in the suit in the lower court nor in the appeal; he has made no appearance whatever.

In *Lacour v. Delamarre et al.*, 2 A. 140, where the only evidence of the wife's authorization was her own statement to that effect in her petition, this court said: "We have held that where the husband and wife appear in the same suit as plaintiffs or defendants, or the husband appears in court as authorizing his wife, the authority on the part of the husband to the wife's appearance necessarily follows, but in this case there is no appearance on the part of the husband in person or by attorney. We consider the rule well settled, and the authorities cited by the counsel for the appellee are conclusive."

The same doctrine was affirmed in *Bray v. Bynum*, 2 A. 879, where a married woman's appeal was dismissed because it did not appear that she had been authorized to defend the suit below, and the husband did not join in the petition of appeal, her averment that she was acting with his assistance not being sufficient.

In our opinion a married woman can only appear in court with her husband appearing also, or by showing his authorization otherwise than in her own averments or that of her counsel. C. C. 123; 1 R. 230, 468; C. P. 106; C. P. 107, 113.

If the husband refuse, or be under interdiction or absent, she may be authorized by the judge to appear in court. C. C. 126, 127.

The motion to dismiss must prevail.

It is therefore ordered that this appeal be dismissed at appellant's costs

No. 42.—WALLACE J. SMITH v. BENJAMIN F. LOGAN.

Two parties claim the same piece of property from the same source of title, the one deriving his title by purchase at private sale, and the other by purchase at a judicial sale under a mortgage, the existence of which was known to the purchaser at private sale at the time, and the evidence shows that the description of the property at the forced sale is the same as that in the private sale. Held—That the purchaser at the forced sale can not be defeated in his title at a suit of the claimant at private sale, on the ground of want of sufficient description of the property at the public sale.

A PPEAL from the Tenth District Court, parish of Caddo. *Jones, J. Williamson & Levises*, for plaintiff and appellant. *T. T. & A. D. Land*, for defendant and appellee.

WYLY, J. This is a suit to annul a judicial sale of a lot of ground in the city of Shreveport, on account of the insufficiency of the description of the property and for informalities in the sale.

In July, 1860, William M. Butler mortgaged to the defendant "the following described lots of ground in the town of Shreveport, to wit: In block twenty-seven (27), commencing at the corner of Lake and Marshall streets, running two hundred feet on Lake street and one hundred and fifty feet on Marshall street; also eighty feet on McNeill street, running back one hundred and fifty feet along an alley, thence eighty feet parallel with McNeill street, thence to McNeill street,

together with all the buildings and improvements thereon, except that portion of said property sold by said Butler to R. G. Lowe, as per record of Caddo parish."

The mortgage was duly inscribed in the mortgage office.

In May, 1861, the defendant foreclosed his mortgage and bought the property, the sheriff's proces verbal describing it just as it was described in the mortgage. The foreclosure and sale was made contradictorily with a curator *ad hoc* appointed by the court to represent Butler, the mortgager, who was an absontee.

In January, 1861, Butler sold to Marx Baer one of the lots which he had previously mortgaged to the defendant, and Baer sold it to the plaintiff. Plaintiff having thus acquired that one of the lots which lies on McNeill street, sues the defendant for the possession thereof, and to have the mortgage and sale to the latter declared void for want of proper description and for want of proper formalities in the alienation.

The defendant pleaded the general issue, admitted that he had a mortgage on the lot claimed by plaintiff, and averred that it was legally foreclosed, and he became the purchaser thereof.

There was judgment for the defendant, and the plaintiff has appealed.

Plaintiff acquired the property from Butler after the mortgage from Butler to the defendant had been executed and duly recorded; he is therefore presumed to have had notice of the mortgage.

He insists, however, that the mortgage itself was null for want of a sufficient description of the property.

Butler acquired the property from J. S. Cutliff in March, 1858, and the description in the mortgage is just the same as in the deed from Cutliff.

He mortgaged the property to the defendant, describing it identically as in the deed by which he acquired it. Plaintiff and the defendant both claim under Butler; the one is the vendee of Butler's vendee, the other is the purchaser under the foreclosure of a mortgage given by Butler on the same lot of ground.

We do not, however, consider the description in the mortgage fatally defective. The situation of the lot at the corner of Lake and Marshall streets, block 27, is sufficiently certain. The lot on McNeill street is also fixed as in block 27 by the reference made to the deed from "Butler to R. G. Lowe, as per record of Caddo parish." This reference and the description given sufficiently establishes the situation of the lot. The deed from Butler to Lowe was of record at the time of the mortgage; it was received in evidence on the trial, and it establishes the identity of the property.

In *Laforest v. Barrow*, 12 A. 148, it was held that "the title of a purchaser under foreclosure of the mortgage who takes possession, can not be defeated by an error in some of the boundaries, where the most important calls in the description are answered, and the identity of the

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property is established *aliunde*; particularly at the suit of a subsequent purchaser under the mortgager with notice."

As to the informalities, if any, in the foreclosure, they can not avail the plaintiff. He was without interest to arrest the executory proceedings by setting up defenses personal to the defendant in execution. The formalities in forced sales are for the protection of the defendant in execution, and not that of third parties to the proceeding.

It is therefore ordered that the judgment of the court *a qua* be affirmed with costs.

No. 177.—MAKLER AND HUSBAND v. MCCLELLAND, Tutor, et al.

A vendor of real estate in order to defeat the mortgagee of his vendee, on the ground of fraud in the sale of the property, must show that the mortgagee was aware of the fraud at the time the contract of mortgage was made.

APPEAL from the Tenth Judicial District, Parish of Caddo. *Taylor, J.*, vice *Levisse, J.*, recused. *A. W. O. Hicks*, for plaintiffs and appellants. *Nutt & Leonard*, for defendants and appellees.

TALIAFERRO, J. The plaintiffs enjoined a writ of seizure and sale taken out by the defendant in his representative capacity on an obligation entered into by the agent of one Bedell, and secured by mortgage on real estate which the plaintiff Magdalena Makler, late widow Miller, alleges belongs to her. There was a general denial by the defendant. Judgment was rendered in the court below in favor of the defendant, and plaintiffs have appealed.

Wright, acting in the capacity of agent under a power of attorney from Bedell, obtained a loan of money from Logan, father of the minor, for the payment of which he executed on the part of his principal a promissory note for \$2200, payable in sixty days, and to secure the payment executed a mortgage on certain property in Shreveport. This property, it seems, was the same or part of the same, which Mrs. Makler, during her widowhood, sold to Bedell by deed, bearing date thirteenth June, 1866. There is now before this court a suit by Mrs. Makler to annul and set aside that sale on the ground of the grossest fraud and deception practiced upon her by Bedell, who, as she alleges, resorted to every species of chicanery, falsehood and imposition to cheat and swindle her out of her property; that she was overreached by his duplicity and induced to sign the act of sale referred to, and has never received one cent for the property which she has thus been foully and wickedly deprived of. The evidence taken on the trial of that case is introduced as evidence in this, and it presents a deplorable spectacle of the ignorance and fatuity of a weak and credulous woman on the one side, and the cool villainy and impudence of an adventurer on the other. That the party complaining has been swindled, there is no room to doubt. The grounds, set up for obtaining the injunction are various, and are as follows:

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First—That the agent exceeded his authority in borrowing money; that the loan was not applied to the purposes for which it was obtained; that the lender was aware of this. And the inference made by plaintiff is that he loaned his money in bad faith.

Second—That it does not appear from the note, mortgage or any authentic evidence that the sum of \$2200 was borrowed money.

Third—That the agent was not authorized to execute the mortgage, nor to contract to pay more than eight per cent. for the loan.

Fourth—Because the note was given for more money than was received for the use of Bedell or was intended for his use, and that this was known to Logan, the lender.

Fifth—That the property mortgaged by the agent was not in the possession of Bedell at the time the order of seizure was granted.

Sixth—Because Alice, the minor child of Logan, had reached the age of puberty at the time the order of seizure issued, and B. F. Logan, the other minor, had, at that time, been emancipated. Therefore, the minor Alice was not a party, and B. F. Logan was unassisted by a tutor.

Seventh—That the mandate, mortgage and supposed judgment are a fraud upon the rights of Mrs. Maklin, conceived and perpetrated by Bedell, Surtin, Lawrence Bayliss and Logan for the purpose of injuring, cheating and defrauding her.

Eighth—Because of the non-payment of the price by Bedell, the price not having been paid or tendered.

Unsupported, as most of these asseverations seem to be by evidence, we think they have but little force. The important inquiry is, was Logan, the lender of the money, a party to the fraud alleged, or had he at the time of lending the money knowledge of the fraud practiced upon the complainant? Mrs. Miller sold to Bedell thirteenth June, 1866. Payment of the price is acknowledged. Wright's power of attorney is full and ample, general and special, covering all the acts he performed in his capacity of agent. The contract of loan and mortgage was consummated on the third of July succeeding the sale to Bedell. The mortgage contains the pact *de non alienando*.

A close scrutiny of all the evidence adduced in this case fails to assure us that Logan had knowledge or notice of the fraud. The only notice or knowledge he is shown to have had of Bedell's title to the property was that which he and others are supposed to have from the fact that that title was of record in the proper office, and that it declares that Bedell had bought the lots from Mrs. Makler, and had paid her for them; and because the purchaser had exercised one of the essential powers of ownership in granting to an agent the authority to mortgage it to any extent. No such circumstances of suspicion as would have led a prudent man to further investigation before parting with his money on the security of such a title is shown. It is shown that he lived near Shreveport, and had lived there for a number of years; that he was a farmer and a money lender, a keen, shrewd man; a note shaver, and therefore likely in all transactions of the sort to look well

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to "the sufficiency of the bond." It is in proof that a proposition was made by Lawrence to Hope, the partner of Tally (a witness of the plaintiff), to advance money on mortgage upon this property before the loan was obtained from Logan. Tally in his testimony says:

"The general opinion of the community of Shreveport was that Mrs. Miller had been swindled in the sale by her to Bedell, and I would not have anything to do with the property in consequence of this general belief." He states also "that the sale from plaintiff to Bedell was not generally known or much talked about until she brought suit to annul it."

It is unfortunate that the plaintiff, through her ignorance and improvident conduct, has placed it in the power of her deceiver to perpetrate frauds upon innocent third parties. Her admissions are also unfortunate, that not being able to raise money upon her property, and being in need, she had placed the title in Bedell in order to procure money; thus in effect admitting that the sale to Bedell was a simulation, she being a party to it. Unintentionally, no doubt, she has placed it out of her power now, in contests with third parties without knowledge of the fraud practiced upon her, to deny the declarations made by her in the deed announcing that she had sold her property to Bedell and received payment for it. In such a state of things, the law can afford her no relief. As to all that the evidence shows, Logan or his representatives are free from any imputation of complicity with the parties guilty of the fraud in question or of any knowledge or notice thereof. She therefore cannot be relieved from the effect of Bedell's mortgage of the property to Logan. The case of *William E. Leverich v. Clemence Toby*, 6 Ann. 462, is closely in point to this case. See *Foster v. Foster*, 11 L. 408. *Stockton v. Craddock*, 4 An. 285.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 180.—H. BORDEN v. J. J. HOPE.

A receipt given for money paid is not conclusive between the parties, and may be contradicted or explained by evidence, but, when the evidence offered is contradictory, and that offered on one side entitled to as much weight as the other, the receipt will stand.

APPEAL from the District Court, parish of Caddo. *Levisee, J. T. T. & A. D. Land*, for plaintiff and appellee. *J. W. Duncan*, for defendant and appellant.

LUDELING, C. J. It appears that in the summer of 1865 H. Borden and J. J. Hope had a settlement of accounts between themselves, and that Hope was found to be indebted to Borden in the sum of seventeen hundred and sixteen dollars. It further appears that this sum was paid by Hope with United States treasury notes and the notes of

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different banks in the Southern States—the notes of the banks being taken at seventy-five cents on the dollar.

In March, 1866, this suit was instituted to make the defendant pay the difference between the actual value of the bank notes and seventy-five cents on the dollar, on the ground that Hope had guaranteed the notes to be worth seventy-five cents on the dollar.

On the trial of the cause the plaintiff offered the testimony of one Rushmore to prove that Hope had warranted the value of the bank notes. The defendant objected on the ground that the testimony was intended to contradict and vary a written paper signed by C. B. Rushmore, agent of the plaintiff, creating an obligation between the plaintiff and defendant in reference to the subject matter referred to in the testimony. The objection was correctly overruled.

It has often been decided that a receipt for money paid was not conclusive between the parties, but that it was open to explanation by evidence. 5 An. 235, 403; 14 An. 274; 12 An. 401.

On the merits the sole question is, did the defendant guarantee that the bank notes were worth seventy-five cents on the dollar? The testimony of Rushmore on the one side is diametrically opposed to the testimony of Hope on the other side. Rushmore swears positively that Hope did guarantee the value of the notes, while Hope swears he did not. He says "he did not undertake to make up the difference to Borden between seventy-five cents on the dollar and what that money should be worth on that day—sixth July, east of the Mississippi river."

The witness Rushmore alone testifies in favor of the position of the plaintiff, and he was the agent of the plaintiff in making the settlement with Hope, and, according to the testimony of Hope, Rushmore had stated to him that Borden intended to make him, the agent, pay the difference. Both witnesses, therefore, were interested in the suit, and one is entitled to about as much credit as the other.

The receipt given by Borden is in the following words: "Received of J. J. Hope the sum of seventeen hundred and sixteen dollars and seventy-five cents in full of all demands to date."

It is *prima facie* proof of what it contains. The evidence offered by the plaintiff has not rebutted that proof.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of defendant for costs of both courts.

No. 171.—R. E. SEWELL, Executor, v. J. N. COOPER.

Partners have no cause of action against each other for a specific sum resulting from partnership transactions until there has been a settlement of the partnership.

APPEAL from the Tenth District Court, parish of Caddo. Taylor, J. George Williamson, for executor and appellee. Looney & Wells, for defendant and appellant.

R. E. Sewell, Executor, v. J. N. Cooper.

WYLY, J. The succession of John M. Landrum, through its proper representative sued the defendant on his promissory note for \$2983 92, and levied an attachment on his property, he being an absentee.

After pleading the general issue, the defendant averred that he gave the note sued on to the executor "as a part or proximate settlement of the partnership heretofore existing between him and the late John M. Landrum, known as the firm of Landrum & Cooper;" that it was well known to plaintiff that said partnership was not and is not yet settled. He averred that he has always been ready and anxious for a partnership settlement and no demand, either judicial or amicable, has ever been made for such settlement, and he therefore moved for the dismissal of the suit.

Further answering, he averred that the note was given in error—that the partial settlement was erroneous; that there was an item of one thousand two hundred dollars charged as the value of a negro woman named "Ann," which was erroneous, the deceased never having made a valid title to him.

Second—The item of six hundred and forty-five dollars, for half value of the negro boy "Gus," was for the same reason also erroneous.

Third—The item of \$2334 88, due White, Smith & Baldwin was erroneous, the same having been paid to A. J. Rugely & Co. by draft, and now forms part of the consideration of a note on which the defendant is sued by Neill Stephens.

Fourth—The item of sixty-seven dollars and forty-eight cents due J. H. Hudgins was erroneous for the same reason.

Fifth—There was an error in not giving the defendant credit for \$1488 36, for the amount paid by draft of Landrum & Cooper for a slave, the private property of Landrum.

Sixth—There was an error in not charging Landrum with \$4000, funds of Landrum & Cooper, arising from the construction of a levee on Red river, and which funds were collected by Landrum.

Seventh—There was error in not crediting the defendant for the amount of taxes of Landrum & Cooper for 1863, which was paid by him.

Eighth—The defendant avers that he paid to J. Dubail \$1500, the debt of Landrum & Cooper, for which he had no credit.

Ninth—Defendant avers that he holds the note of Landrum & Cooper, due the succession of William Gardner, for hire of slaves for 1860.

The defendant further avers that he left on the plantation of Landrum & Cooper four bales of cotton belonging to said firm, worth eight hundred dollars, which have not been partitioned, and which have been used or appropriated by the plaintiff. Also that there remained on said plantation one hundred head of cattle, worth seven hundred dollars, belonging to said firm, which have not been partitioned, but have been used or appropriated by the plaintiff.

The defendant prayed that plaintiff's demand be rejected, and for judgment in reconvention for \$4000.

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The court gave judgment for plaintiff for \$3764 29, and gave the defendant judgment on his reconventional demand against the plaintiff for sums amounting, in the aggregate, to \$2925 65, and maintained the attachment.

The defendant has appealed.

The answer raises issues widely different from those presented in the petition.

From the evidence we are satisfied that there never has been a final legal settlement of the partnership heretofore existing between John M. Landrum and the defendant.

The attempted settlement of the executor and the defendant in 1864 was had without the sanction or authorization of the court, and was not such as the law requires. Besides, it appears from the records that all the debts of the partnership had not been paid, and there was some cotton and other property not partitioned.

The note sued on but evidences the supposed indebtedness of the defendant to the succession of Landrum, after the settlement of the partnership.

It is well settled that partners have no cause of action for a specific sum, against each other, resulting from partnership transactions, till the partnership debts have been paid, or there has been a settlement of the partnership.

Plaintiff has not prayed for a settlement of partnership affairs and the pleadings are not such as are required for the settlement of the partnership.. His demand must therefore be rejected, and the reconventional demand must also be rejected.

It is therefore ordered that this suit be dismissed, without prejudice to the right of either the plaintiff or defendant to sue for a settlement of the partnership of Landrum & Cooper.

It is further ordered that plaintiff pay all costs.

No. 190.—PASIANA et al. v. POWELL.

All informalities that occur in connection with the probate proceedings for the sale of land, are prescribed by the lapse of five years from the date of the sale. Revised Statutes, 1856, page 22, § 4.

APPEAL from the Tenth Judicial District Court, parish of Bossier. *Weems, J. Nutt & Leonard*, for plaintiffs and appellees, *George Williamson*, for defendant and appellant.

TALIAFERRO, J. The plaintiff Marie Yasan Pasiana, widow of Jean Pierre Schlette, in her own right and as tutrix of her minor children, heirs of the said Schlette, joined by his major heirs, bring this suit to recover a tract of land which she alleges is in the possession of the defendant Eliza Powell, who illegally detains it from the plaintiffs, who allege that they are the lawful owners. They pray judgment accordingly, and for fruits and revenues,

Pariana et al. v. Powell.

The defendant enters a general denial. She avers that she is the true and lawful owner by title derived through her late husband, William A. Powell, by a probate sale under and by virtue of an order of sale rendered by the Court of Probates of the parish of Bossier. She prays also in case of eviction that she have judgment for one thousand dollars, the price paid by her husband for the land with reservation of the right to recover for improvements, etc. Judgment was rendered in favor of the plaintiffs, decreeing them to be the owners of the land, annulling the pretended sale under which defendant claims, dismissing the defendant's claim for fruits and revenues as of nonsuit, and ordering a writ of possession to issue in favor of plaintiffs.

From this judgment the defendant appeals.

The records of the parish of Bossier seem to have been thoroughly examined in order to procure all the proceedings had in relation to the probate sale of the land in question, and they appear *in extenso* in the record. By these documents it appears that one Scarborough filed a petition in the clerk's office of that parish on the twenty-seventh of October, 1853, setting forth that Jean Pierre Schlette had died in that parish in the preceding April; that his estate was in debt; that an administration was necessary, and representing himself as "a party interested," prayed to be appointed administrator, and that an inventory be made. This application was followed up by the usual proceedings, in apparently regular order, to the time of the order of sale, which was rendered on the twenty-second of December, 1853. The plaintiffs allege fraud and collusion between the administrator and the purchaser of the property.

There is no evidence that sustains the allegation. The sale was made on the seventh of September, 1854, and this suit was filed twenty-seventh March, 1860, more than five years having intervened. The defendant opposes to plaintiffs' claim the prescription of five years against the informalities alleged by plaintiffs to appear in the proceedings taken in connection with the sale of the land in controversy. The plea of prescription we think must prevail. See Revised Statutes, page 22, section 4.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed.

It is further ordered that judgment be rendered in favor of the defendant, quieting her in the ownership and possession of the land claimed by plaintiffs; and it is further ordered that plaintiffs and appellees pay costs in both courts.

ON APPLICATION FOR REHEARING.

Purchasers need not look beyond the decree of the court, if the facts necessary to give the court jurisdiction appear on the face of the proceedings. 13 L. R. 431.

The rehearing is refused.

Elias O'Neill et al. v. Police Jury of the Parish of Caddo et al.

No. 166.—ELIAS O'NEILL et al. v. POLICE JURY OF THE PARISH OF CADDO et al.

The city of Shreveport has no control over the public ferries across the Red river beyond the limits of the corporation.

The police jury of the parish of Caddo has the right to establish as many ferries across the Red river or other water courses, and outside of the corporation of Shreveport, and within the limits of the parish, as the public convenience may require.

APPEAL from the Tenth Judicial District Court, parish of Caddo. *Weems, J. Richard W. Turner, and Looney & Wells*, for plaintiffs and appellants, *Nutt & Leonard* and *J. W. Jones*, for appellees.

TALIAFERRO, J. It is averred by the plaintiffs that Elias O'Neill in July, 1867, leased for a term of seven years from the city of Shreveport and the parish of Bossier, at the annual sum of \$4500 rent, the public ferry across Red river at Shreveport. That being in the discharge of his obligations under this contract of lease, his rights and privileges under the same have been infringed and great damage caused him by the police jury of the parish of Caddo, which has established a ferry across Red river within a few feet of the corporation line of Shreveport, and leased the same to T. E. Jacobs, who in conjunction with William Thatcher have the said ferry so established by the parish of Caddo in active operation, whereby the business and income of the ferry leased by him from the city of Shreveport is vastly reduced and rendered valueless to him. He prays judgment *in solido* against Thatcher, Jacobs and the police jury of Caddo for \$16,000, and \$150 per month for each month said ferry has been or may continue in operation. The plaintiffs call in the city of Shreveport as their guarantor in the premises, and pray judgment against it for \$5000.

The defendants filed separate answers specially denying that they are in any manner liable to the plaintiffs on their demand. The answer on the part of the police jury of the parish of Caddo asserts its legal right to establish the ferry complained of; that the establishment of that ferry was called for to meet the public wants and convenience; that it would be against public policy and order to tolerate a monopoly in favor of the plaintiffs of the ferries across Red river within the limits of the parish of Caddo. It further claims in reconvention \$2000 damages from the plaintiffs, amount of attorney's fees incurred in defending the plaintiffs' wanton and vexatious suit.

There was judgment for the defendants, and plaintiffs have appealed.

The only inquiry it seems to us is, has the plaintiff O'Neill, by law, any special franchise or privilege by which he is protected from competition in the use of the ferry he has leased, beyond the corporate limits of Shreveport?

We consider the act of 1805, granting to Parish Judges the right to grant licenses to ferrymen as superseded and repealed by later legislation and especially by the act of March, 1855.

Elias O'Neill et al. v. Police Jury of the Parish of Caddo et al.

We are unable to find any general law establishing a specific distance within which the keeper of a public ferry is secured against the establishment of any other public ferry. It would be difficult if not impracticable for the law maker to enact a law of that sort which could be beneficially carried out in practice. It is in the public interest that monopolies should be, as far as practicable, prevented and restrained. We are inclined to think from the evidence in the record that the police jury of the parish of Caddo acted upon this principle in establishing the ferry which gave rise to this controversy. We are satisfied that its establishment has redounded to the public advantage and to the general convenience of the community, considerations which must always prevail over personal interest and private cupidity. We find no law that sustains the pretensions of the plaintiffs, and we think they have no right to complain of the legitimate exercise of the powers of the police jury of the parish of Caddo in establishing a ferry outside of the corporate limits of Shreveport.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

Rehearing refused.

No. 179.—G. W. BANNER & CO. v. M. MARTI and WALTERS & ELDER.

Where the verdict of the jury contradicts the admissions of the defendants in the answer, and the ends of justice require it, the cause will be remanded.

A PPEAL from the District Court, parish of Caddo. *Levisse, J. Wright & Duncan*, for plaintiffs and appellants. *Land & Taylor*, for defendants and appellees.

Howe, J. This suit was instituted against M. Marti, as a member of the late firm of Marti & Bradley, to recover the sum of \$5407, upon a bill of exchange, which it was alleged had been given to plaintiffs in payment for goods purchased. It was further averred by plaintiffs that the firm of Marti & Bradley had been dissolved by agreement and that the goods and assets had been placed in the hands of Marti for the purpose of liquidation, but that he had made a fraudulent transfer of the entire stock in trade (including the goods sold to his firm by plaintiffs, and in value about \$9000) to the firm of Walters & Elder, who were aware of his insolvent condition. The bill sued on fell due April 3, 1867, and the transfer, alleged to be fraudulent, was made about eleventh March, 1867. They prayed for judgment against Marti for the amount of the debt, and for the annulment of the sale as fraudulent and to their prejudice, and for judgment *in solido* against Walters & Elder for the amount of their claim.

The defendants pleaded the general denial—specially denied any knowledge of the business affairs of M. Marti or Marti & Bradley, or of their insolvency, and then proceeded to admit as follows :

"Defendants admit that they purchased from M. Marti a bill of goods in open market and paid said Marti the full value thereof, as a perfect, legitimate and ordinary transfer, and said goods were delivered to defendants after payment of the consideration therefor and without knowledge that said Marti was owing any one for said goods, or for any other merchandise." They specially denied that they ever purchased any goods from said Marti that ever belonged to plaintiffs, and required strict proof in this regard. They also denied that they purchased all the goods of said Marti & Bradley, or of said Marti, and specially averred "that the goods they did purchase were only a small portion of the original stock of said Marti & Bradley, and only such as were suited to the demands of defendants and were not purchased for the purposes of fraud or for any unjust advantage of any one."

The case was tried by a jury, which was demanded by Walters & Elder. No answer was made by Marti. The jury rendered the following verdict:

"We, the jury in the case of G. W. Bancker & Co v. M. Marti, find the following verdict: a judgment against M. Marti for the full amount of the claim of G. W. Bancker & Co., fifty four hundred and twenty-seven dollars with interest. We further find there was no sale to the firm of Walters & Elder by M. Marti."

The plaintiffs moved to set aside this verdict as to Walters & Elder, on the grounds that it was contrary to law and evidence, that it was not responsive to the pleadings, that it did not dispose of the issues involved in the suit, and that no judgment could be rendered on that part of the verdict.

The motion appears to have been overruled, and judgment was entered against Marti for the sum demanded, and in favor of the defendants, Walters & Elder, for their costs, and plaintiffs appealed.

We are constrained to say that the verdict of the jury in this case is very unsatisfactory. Upon the question of the indebtedness of Marti, their action being merely in confirmation of judgment by default on a bill of exchange, they seem to have arrived at a correct conclusion; but their finding upon the other branch of the case ought to be set aside. They say there was no sale to the firm of Walters & Elder by M. Marti. Yet the answer of Walters & Elder admits, as we have seen, that there was a sale, and the natural interpretation of the answer, as a whole, would seem to be that the defendants, while admitting the transfer alleged by plaintiffs, deny that certain goods were included in it, and that it was made in fraud of the rights of plaintiff and to their prejudice. Their averment that the goods they did purchase were only a small portion of the "original stock" of Marti & Bradley does not militate against this admission or against the averments of the plaintiffs. The question was of a sale of the stock on hand about eleventh March, 1867, after the dissolution of the

G. W. Bancker & Co. v. M. Marti and Walters & Elder.

firm. It is shown by the pleadings that the firm existed at least three months before that time.

We are of opinion that for this reason, and in the interests of justice, the cause should be remanded for a new trial, as between the plaintiffs and Walters & Elder, that the question of the character of the sale may be determined.

It is therefore ordered and adjudged that the judgment appealed from as to the defendant Marti, be affirmed, that in other respects the same be avoided and reversed, the verdict of the jury set aside, and the cause remanded for a new trial according to law; the costs of the appeal to be paid by the appellees.

No. 181.—R. L. GILMER, Application for Monition. Opposition of JOSEPHINE NICHOLSON et als.

A third party who makes opposition to a monition sued out by the purchaser at judicial sale, must, in order to maintain his opposition, show an injury resulting to himself from the sale.

A PPEAL from the District Court, parish of Caddo. *Levisse, J. Nutt & Leonard*, for appellant. *Wright & Duncan*, for opponents, appellees.

HOWELL, J. R. L. Gilmer having purchased certain lands in the parish of Caddo, at a sheriff's sale, made under a writ of execution issued in the suit of Josephine Nicholson and Husband v. Laura J. Willis, applied for and published a monition under the statute of 1855, p. 463, which application was opposed by the said Josephine Nicholson and husband on the grounds following:

First—Because the property described is the only property which the defendant possesses, out of which plaintiff in execution can make her judgment, and the price for which it was adjudicated, to wit, seven hundred dollars, amounting to but a fraction of her said judgment.

Second—Because said sale was made contrary to the instructions of the plaintiff, who, through her attorneys and agent directed the sheriff on the day of sale not to expose the property to sale.

Third—Because the said sale was not made according to the advertisement.

Fourth—Because said property was not appraised at one-fourth of its value.

Under the view which we have taken of the case, it becomes unnecessary to pass on the bill of exceptions of the appellant, Gilmer, to the admission of the witness Duncan's testimony. The evidence in the record does not show that the sale in question has caused or can cause the opponent, Mrs. Nicholson, any injury, and hence she has no

R. L. Gilmer, Application for Monition. Opposition of Josephine Nicholson et als.

interest in having the sale set aside. There is no proof that the property was appraised or sold for less than its value, and it is not even alleged that opponent or any other person would give more for it than the price at which it was sold. It has been frequently held that judicial sales ought not to be disturbed, unless the party suing can show an injury resulting to him from the sale, as well as an interest in the result of the suit. 6 A. 54, 581; 5 A. 260; 3 A. 656, 664; 2 A. 902.

It is therefore ordered that the judgment appealed from be reversed; that the opposition of Josephine Nicholson and husband be dismissed; that the judicial sale made on the third day of February, 1866, by the sheriff to R. L. Gilmer, by virtue of a writ of *feri facias* issued in the case of Josephine Nicholson and Husband v. Laura J. Willis, No. 6752 on the docket of the District Court, parish of Caddo, for the sum of seven hundred dollars of the following described property, to wit: the southwest quarter of northwest quarter of section twenty-three, township seventeen, range fifteen, containing forty acres; also, the southwest quarter and the east half of northwest quarter and the west half of the northeast quarter, section twenty-three, and the east half of northeast quarter, section twenty-three; also, the north half of west half of northwest quarter, section twenty, township seventeen, range fourteen, containing in all four hundred and eighty acres, with all the improvements thereon, except the buildings on said land, and one hundred and sixty acres of said land on which said buildings are situated, and which lies immediately adjacent the buildings, the sale of which was enjoined by an order of the District Court of said parish in suit of L. J. Willis v. Simpson, Sheriff, *et al.*, No. — on the docket of said court, be homologated and confirmed, and that the opponents pay the costs in both courts.

No. 191.—J. S. SIMONS v. STEAMER R. WHITE AND OWNERS.

- The instructions of the attorney of record, who placed the writ of *fi. fa.* in the hands of the sheriff, to retain it after the return day, will protect the sheriff from liability for failing to return the writ.

APPEAL from the District Court, parish of Caddo. *Taylor* (attorney-at-law), presiding, vice *Levisse*, J., recused. *Williamson & Levisse*, for plaintiff and appellant, *S. N. Chapman*, for defendant and appellee.

LUDELING, C. J. This is an action by rule on the sheriff, Nathan Hoss, to show cause why there should not be judgment against him for the amount of a *feri facias* placed in his hands for failing to return the writ before the expiration of the return day.

The evidence shows that R. S. Parham, an attorney at law, received the writ, and placed it in the hands of the sheriff; that subsequently he instituted proceedings in garnishment, to collect the amount of the debt; and that he did collect from the parties garnished about thirteen hundred dollars. It appears further that the sheriff was directed and instructed to hold up the writ, and not return it until after the return

J. S. Simons v. Steamer R. White and Owners.

day. In the present suit the plaintiff has denied under oath the attorney's authority to represent him. Whether or not this affidavit is sufficient to prove a want of authority in the attorney to act, under the circumstances, is immaterial in this case. It is not shown that the sheriff had any reasons to doubt the authority of the attorney to act in the matter. The writ was placed in his hands by the attorney, and the garnishments sued out were obtained by said Parham. These facts justified the sheriff in believing Parham was the authorized attorney of the plaintiff; and he was the attorney of record. We think the instructions of the attorney directing the sheriff to retain the writ in his hands should protect him from liability for not returning the writ, even if the plaintiff had not ratified the acts of Parham by settling with him for the moneys collected by him. Sheriffs have responsible and delicate duties to perform; and they should not be mulct in damages except when it is clear that they have been derelict in the discharge of their duties.

It is therefore ordered and adjudged that the judgment of the District Court be affirmed; and that the appellant pay the costs of appeal.

No. 173.—L. MEYER & BROTHER v. SIMPSON, Sheriff, et. al.

A sale of immovables has no effect against third parties, until it is recorded in the proper office, in the parish where the property is situated. Acts of 1855, page 335 § 2.

21	591
105	138
21	591
125	164

APPEAL from the District Court, parish of Caddo. *Levissee, J. George Williamson*, for plaintiffs and appellees, *Looney & Wells*, for defendants and appellants.

LUDELING, C. J. The plaintiffs have enjoined the sale of property seized under a writ of *fi. fa.* issued in the case of Simon Levy, Jr., v. Strauss, et al. They claim to be the owners of the property seized, and exhibit, in support of their claim, a notarial act, passed in New Orleans, *but not recorded in Caddo* where the property is situated, until after the seizure. They also offered in evidence an act from the judgment debtors to one Rothan, the plaintiffs' vendor, which was recorded before the seizure.

The last act is alleged to be a simulation, and the evidence in the record leaves no doubt in our minds that this position is correct. Rothan, the brother-in-law of the Strauss, came from St. Louis, where he resided, to Shreveport, and in a short time, by successive transfers, the Strauss made sales of their real estate, their interest in a steamboat, and of all their cottons, scattered in Texas and Louisiana, to said Rothan. These sales "*omnium bonorum*" are always suspicious. In this case the testimony of the witnesses and the acts of the parties leave no doubt of the simulated character of the transactions. As

L. Meyer & Brother v. Simpson, Sheriff, et al.

against third persons the sale to Meyers & Co. had no effect until its registry in the parish where the property is. 7 N. S. 661; 2 La. 125; 6 R. 314; 6 La. 530; 2 An. 397, 869; 14 An. 833; *Swan v. Moor*.

It is not necessary to examine the bills of exceptions taken by the defendant. It is, therefore, ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that there be judgment in favor of the defendants dissolving the injunction, with ten per centum on the amount of the execution enjoined, as general damages, against the plaintiffs and Rebecca Meyer and D. L. Tally *in solido*, with the costs of both courts.

Rehearing refused.

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120 83
1120 46

No. 54.—C. McCARTY v. STRAUS and BAER & STRAUS.

Where the names of one of the parties to a contract has been signed by a person representing himself to the other as their agent, and the parties whose names have been thus signed specially deny the authority in a suit to enforce it, the burden of showing authority in the agent to sign the names of the principals, or a subsequent ratification by them falls on the party who seeks to enforce the contract.

APPEAL from the District Court of Caddo Parish. *Weems, J.* *James W. Duncan*, for plaintiff and appellee. *Williamson & Levisse*, for defendants and appellants.

LUDELING, C. J. The plaintiff sues the defendants *in solido* for five thousand dollars in specie, the value of twenty thousand pounds of lint cotton. The claim is based on the following instrument:

“SHREVEPORT, LA., May 29, 1865.

“I have this day sold, and by these presents do bargain and sell on my own account and for Baer & Straus, forty bales of good middling cotton, averaging five hundred pounds per bale (twenty thousand pounds in all), to be delivered immediately if called for, to C. McCarty, of this city. Also I sell and transfer on the same account and to the said McCarty, forty-seven bales of cotton, marked J. S., now at Monterey, in Texas, originally stored with A. M. Hull & Co., of Shreveport, and removed to Monterey.

“Now, it is understood and agreed that if I, the said Jacob Straus, or Baer & Straus, shall deliver to the said McCarty twenty thousand pounds of good middling cotton in good shipping order in Shreveport, or shall pay to him in specie the value of said twenty thousand pounds of cotton, estimating the price according to current rates when the trade may be opened regularly with New Orleans; then the sale of the cotton named (if money is paid) shall be annulled, and the whole eighty-seven bales of cotton shall return and belong to Baer & Straus; otherwise the said McCarty can proceed to obtain out of the whole amount the value, in the Shreveport market, of twenty thousand pounds of good middling cotton as aforesaid.

“BAER & STRAUS,
“per JACOB STRAUS.”

C. McCarty v. Straus and Baer & Straus.

And the plaintiff prayed for and obtained a writ of sequestration against certain cotton in the possession of Baer & Straus, on the ground that he had a privilege on it.

The defendants filed a motion to set aside the sequestration, on the ground that the plaintiff had no privilege on the cotton sequestered. And by consent the motion was tried with the merits.

The defendants, Baer & Straus, filed an answer in which, after a general denial, they specially deny that the document sued upon was signed by them or either of them, or by any one authorized to represent them.

The defendant Jacob Straus filed no answer, and no default was taken as to him.

There was judgment in favor of the plaintiff for four thousand dollars in specie against all the defendants *in solido*, and maintaining the writ of sequestration issued against the cotton.

All the defendants have appealed.

Baer & Straus expressly denied that the instrument sued on was signed by them, or by any one who had authority to bind them. It was the plain duty of the plaintiff to prove that Jacob Straus was authorized by them to bind them, or to prove that they had ratified his acts. The evidence in this record fails to satisfy us that Jacob Straus was authorized to bind Baer & Straus, or that Baer & Straus ever ratified his acts. The acts of a party from which the ratification of a contract is sought to be deduced, must evince clearly and unequivocally *his intention to ratify*. 17 La. 286, *Copeland v. Mickie et al.* There is no evidence to show that Baer & Straus, or either of them, ever did or said anything whereby they manifested an intention to bind themselves. On the contrary, each denied his liability. Besides, the only evidence which tends to prove a ratification is the testimony of Wright. The contract attempted to be established exceeds five hundred dollars. C. C. 2257.

The judgment against M. Baer and Joseph Straus is erroneous.

We have already noticed that no default was taken against Jacob Straus, and that no answer was filed by him. No issue having been joined as to him, the trial was premature.

The views we have expressed make it unnecessary to pass upon the bills of exceptions taken by the defendants.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed; that there be judgment in favor of Baer & Straus against the plaintiff, rejecting his demand, and that the writ of sequestration be dissolved.

It is further ordered that this case be remanded to the court *a qua*, to be proceeded in according to law against Jacob Straus; and that the plaintiff pay the costs of the sequestration and of this appeal.

No. 185.—GRAHAM & ANDERSON v. THOMPSON WILLIAMS.

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oll17 202

A copy of a deed of trust and the assignment thereof which is kept in a public office of any State, not appertaining to a court, is admissible in evidence in the courts of this State, on being properly attested by the keeper of such records, without showing the loss of the original. Act of Congress of March 27, 1804.

By a statute of Mississippi, approved March 13, 1837, copies taken from the record of all instruments in writing may be received in evidence, and when so received they have the same effect as though the original were produced.

When a statute of another State has once been recognized as law in that State, by a decision of the courts of this State, the courts of Louisiana will thereafter take judicial cognizance of the statute, and, until it be proved that the law has been changed, will presume it still exists.

A depositary can not be permitted to introduce evidence to impeach the title of the depositor.

APPEAL from the District Court, parish of Caddo. *Weems, J. T. T. & A. D. Land*, for plaintiffs and appellants. *Jones & Harris*, for defendant and appellee.

LUDELING, C. J. The plaintiffs sue the defendant, claiming that they are the legal owners of thirty-five bales of cotton left with him as depositary by Willis Holmes for Victor F. Wilson. They allege that they acquired the title to said cotton by virtue of an assignment made in the State of Mississippi to them for the benefit of certain parties living in Great Britain.

They allege that the cotton weighed eighteen thousand seven hundred and thirty-six pounds, and was worth ten thousand five hundred dollars at the time they demanded the cotton from said Thompson Williams, and that said Williams has converted the cotton to his own use wrongfully. They pray for judgment for the amount just stated, with interest from judicial demand. Later the plaintiffs filed a supplemental petition, alleging that in a judicial proceeding, in which they were parties, they obtained an order of court to get possession of the cotton which had been left in the hands of the defendant by the sheriff as his keeper, and that he is liable to them for the value of the cotton, which he fails to deliver.

The defendant for answer denied all the allegations of the plaintiffs, except the genuineness of his receipt attached to the petition. He alleged that the contract between Willis Holmes, agent, and Reaves, Williams & Johnson was executory only, and that the consideration of the agreement to sell was Confederate money, and was null and void. For further answer he alleged that the said cotton was seized in the suit of *James v. Wilson*, and that this respondent, in ignorance of his rights, was employed by the sheriff to remove it from defendant's plantation to Shreveport. That he commenced removing the cotton, and during his absence from home with the first load of cotton the remainder, of the cotton, twenty-eight bales, was stolen or carried away from his plantation against his will and without his knowledge or fault.

The case was tried by a jury, who rendered a verdict in favor of defendant. The judgment of the court was in conformity to the verdict, and the plaintiffs have appealed.

On the trial the defendant retained bills of exceptions to the ruling of the court, permitting the records in the suit of James v. Wilson to be filed in evidence. The objections urged were *irrelevancy and inadmissibility*. We think the judge correctly received the evidence. The defendant took another bill of exceptions to the ruling of the judge *a quo*, receiving in evidence the assignment executed in the State of Mississippi, on the following grounds: First, that the copy offered was unaccompanied by proof that, by the laws of Mississippi, such a copy was admissible in evidence in that State; second, that it was only a copy of a copy; third, that there was no proof of the signature of P. Anderson, one of the trustees, nor of the signature of R. McDowell; fourth, that the original was in the possession of the plaintiffs, and they had to account for its loss before they could introduce a copy; fifth, that a deed of trust is not recognized by the laws of Louisiana unless first shown that such deeds are valid in the State where it was executed.

First—The act of Congress, passed in conformity with the constitution declares that “the records and judicial proceedings authenticated as aforesaid, shall have *such faith and credit* given to them in every court within the United States as they have, by law or usage, in the courts of the States from whence the said records are or shall be taken. Act twenty-sixth March, 1790. By the act of Congress of twenty-seventh March, 1804, it is provided that “all *records* and exemplifications of office books which are or may be kept in any public office of any State not appertaining to a court, *shall be proved or admitted in any court or office in any other State by the attestation of the keeper of said records or books, and the seal of his office thereto annexed, etc., and said records and exemplifications authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States as they have by law and usage in the courts or offices of the States from whence the same are or shall be taken.*”

The assignment was recorded in the State of Mississippi, and was duly authenticated, and it was properly received in evidence. 11 R. 259; 7 An. 147, *Smith v. McWaters*.

It is a sufficient answer to the second objection to say that the act of Congress makes no such exceptions, but seems to contemplate the reception of a copy of the record. 7 An. 147.

Third—The presumption is that the officer who recorded the deed in Mississippi did his duty.

Fourth—Under the act of Congress it is not necessary to produce the original deed, or to account for its loss. 11 R. 259.

Fifth—This objection goes rather to the effect of the deed than to its admissibility. However, this court has often recognized the validity of such deeds. 7 Rob. 1; 8 R. 262; 4 An. 254.

The plaintiff retained a bill of exceptions to the ruling of the court admitting evidence to show what was the consideration paid for the

cotton by Willis Holmes, agent, on the grounds that the receipt annexed to the petition shows that defendant held possession of the cotton as bailee of the purchaser under written contract of bailment; that consequently he can not question the title of his bailor; that the contract was an executed contract as between the sellers of the cotton and Wilson, agent for the Southern Railroad Company; that the plaintiffs acquired the cotton from said company on the faith of the cotton receipt, which declared that defendant held possession of said cotton as the bailee for the purchaser and subject to his order, and that the defendant is thereby estopped from denying or questioning the truth of the statements in the receipt. We think the evidence should not have been received. The sale between Reaves, Williams & Johnson and Willis Holmes, agent, was completed at the time the receipt was given. The parties had executed their contract for the sale of the cotton by receiving the price and delivering the cotton. At whose risk was the cotton after the execution of the receipt annexed to the petition? Unquestionably the loss would not have been the sellers' if the cotton had been destroyed. C. C. 1903, 2442, 2443. Neither can a depositary question or impeach the title of the depositor. C. C. article 2921.

The defendant does not pretend that the receipt was given in error, or that its statements are not true as against himself and those whom he represents. "A man's actions and representations will be presumed to correspond to the truth. They are in all cases evidence of the fact; and when a party has induced another to act on the faith of such representations, and when he can not show the contrary without a breach of good faith and common honesty, such representations are usually absolutely conclusive." 5 R. 523; 1 An. 11; 6 An. 274; 4 An. 293, *Gales v. Christy*.

The plaintiffs took a bill of exceptions to the charge of the judge to the jury. The portion of the charge objected to was "that the deed of trust offered in evidence by the plaintiffs was without effect as proof of title in the trustees, although authenticated as required by the act of Congress of twenty-seventh March, 1804, and did not dispense the plaintiffs from producing the original deed of trust in evidence, and showing that it was receivable in evidence in the State of Mississippi."

We have already said this act was properly received in evidence. And *such faith and credit* to it should be given as it would have in the courts of Mississippi; and in *Smith v. McWaters* this court said: "A statute of the State of Mississippi, approved thirteenth May, 1837, provides that *copies* of all recorded deeds, conveyances, bonds and other instruments of writing which are now or may hereafter be permitted to be recorded *shall*, when certified by the clerk in whose office the record is kept, *be received in any court of law or equity in this State, and be as available without accounting for the absence of the original as if the original were then and there produced.* We think the copy from the record was intended by this act." 7 An. 147.

Graham & Anderson v. Thompson Williams.

In *Arayo v. Currell* this court said: "When a court knows nothing of the laws of a country it presumes them to be the same as those of its own. This is the general rule, and the presumption rests on the ignorance in which it is of any other. If it has *judicial knowledge* of a law of a particular country the presumption does not exist." We are bound to take judicial cognizance of the existence of the statute quoted in the case of *Smith v. McWaters*, and until it be proved that the law has been changed we will presume it still exists. 1 La. 541, 255; 4 An. 129.

The charge to the jury was erroneous. We believe that the ends of justice will be subserved by remanding the case to the District Court to be tried in accordance with law.

It is therefore ordered that the judgment of the District Court be annulled; that the verdict of the jury be set aside, and that this case be remanded to the District Court to be proceeded in according to law. It is further ordered that the appellee pay the costs of appeal.

No. 69.—JENKINS v. HOWARD.

Where the order fixes the amount of the bond for a devolutive appeal, and the amount required by law for a suspensive appeal, and the bond given is for an amount less than that required by law for a suspensive appeal, the appeal will not be dismissed but will be declared devolutive only.

Two parties having formed a commercial partnership in a single transaction, and having by mutual consent made a partition between them, may enforce their respective claims against each other without bringing suit for a settlement of the partnership.

A PPEAL from the Tenth Judicial District, parish of Caddo. *Weems, J. Aleck Boarman*, for plaintiff and appellant. *Looney & Wells*, for defendant and appellee.

TALIAFERRO, J. The defendant is sued for \$750, which the plaintiff alleges defendant owes him on account of a partnership transaction. The defendant denies owing the plaintiff anything, and claims from him in reconvention \$210, that being one half the costs of hauling certain cotton which defendant avers he paid on joint account. There was judgment rendered against the plaintiff on his demand and in favor of the defendant for his reconventional demand. The plaintiff has appealed.

There is a motion to dismiss the appeal on the ground that the bond is defective for the reason that it was expressly given for a suspensive appeal, being limited as to the extent of the obligation.

A motion was made by the appellant for an appeal suspensive *and* devolutive. The order granted a suspensive appeal with bond in the amount fixed by law. The bond for a devolutive appeal was fixed at one hundred dollars. The bond executed by the appellant is for \$300. It is insufficient for a suspensive appeal, but suffices for a devolutive

appeal. The motion to dismiss is therefore overruled. The facts of this case are that the plaintiff and defendant during the summer of 1865 embarked in a cotton adventure, a single operation, and the only one they made. This was the purchase of seventy bales of cotton which were to be sold again on their account. This lot of cotton was purchased in the parish of DeSoto and hauled to Shreveport, where it was deposited in care of Boisseau. Boisseau, called as a witness, stated that Howard, who, it appears, was the principal acting partner of the concern, directed him to ship thirty-five bales of the cotton on his account to Carroll, Hoy & Co., in New Orleans, which was accordingly done; that Howard further instructed him to hold the remaining thirty-five bales to the order of Jenkins, who subsequently expressing no dissatisfaction at the course pursued by Howard, instructed witness to ship the remaining cotton on his account to the house of John Philips in New Orleans, which instruction was complied with. The cost of hauling the cotton was \$420, which was paid by Howard. It appears that the lot of cotton shipped by Howard to Carroll, Hoy & Co. brought \$7928 69 net; and that the net proceeds of the lot shipped by Jenkins to John Philips were \$6735 77. The half of the excess in proceeds of the cotton shipped by Howard over that shipped by Jenkins the latter claims he is entitled to, to make him equal in receipt of profits. A single adventure of the character of that made by these parties, a commercial operation, where the purpose is to buy and afterward to sell the commodity for profit constitutes the parties commercial partners, and creates a commercial partnership *quoad* the single transaction. Then, if not otherwise rendered unnecessary by the acts of the parties who were alone interested, a formal settlement of the partnership affairs should have preceded a partition of the assets. This the plaintiff does not ask for in his petition. He treats the partnership as at an end, its affairs as liquidated, and its effects ready for division between the partners. The partition, however, the defendant contends, was made by mutual consent, from the fact that each partner took thirty-five bales of cotton and had them sold on his separate account, leaving only the expenses incurred on account of the cotton to be adjusted by the parties. We are inclined to think this to be the proper construction to be given the acts of the parties and to approve the judgment of the lower court.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

State v. Leopold Loeb et als.

No. 172.—STATE v. LEOPOLD LOEB et als.

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An order of the judge authorizing the sheriff to discharge the prisoner on giving bond, in a fixed amount, is a sufficient authority to the sheriff to receive the bond and file it in court, and the sureties on the bond having obtained the prisoner's release, on this construction, are debarred from setting up this defense in a suit for the forfeiture of the bond.

The condition in a bond of release "that the prisoner shall not depart without leave of the court," will bind the sureties, although the offense is not accurately described in the body of the bond.

APPEAL from the District Court, parish of Caddo. *Levises*, J. *James S. Ashton*, District Attorney, for the State. *R. J. Looney*, for defendants and appellants.

HOWE, J. Leopold Loeb was indicted for willfully and maliciously setting fire to and burning a dwelling house of one Eberstadt, in the night time, the house being occupied, in part, as a dwelling by one Rodmore, and in part as a store by the accused.

He was tried and the jury failed to agree. He applied, by writ of *habeas corpus*, for the privilege of bail, and the judge *a quo* made an order that he be admitted to bail in the sum of \$3000, and that the sheriff be authorized to take the bond. He then applied for a reduction of bail, and the judge, setting aside his previous order, made the following :

"That the sheriff of Caddo parish be authorized to discharge said Loeb from custody on his giving bail, conditioned as the law directs, in the sum of two thousand dollars (\$2000)."

The bond was given with the appellants as sureties, and the accused having failed to appear for trial, judgment was rendered on the bond against the principal and the appellants for the amount thereof, with costs.

The appellants assign for error :

First—That there is no bond given by and with the approval of the District Court or certified by the judge of said court.

Second—That the bond was not taken by any person authorized to take or approve the same.

Third—That the bond was given for and on the condition that the principal appear and answer to a different charge from that found in the bill of indictment, and to a charge that does not violate any criminal law of Louisiana.

As to the first and second objections, it appears by the order quoted that the judge fixed the amount of the bond, and authorized the sheriff to release the accused upon the bond being given. It would seem that an authority to discharge a prisoner upon a bond being furnished in an amount fixed, included an authority to receive the bond and file it in court. Be this as it may, however, the facts of this case are quite as strong against the appellants as those in the *State v. Ainslie*, 13 Ann. 298. In that case it was held that the sheriff, or even his deputy, in

whose custody the accused was when the order, designating no person to take the bond, was rendered, might take it; and that neither the accused, nor his sureties, who, by so construing the order, have obtained the former's release, can gainsay a construction on which they have themselves acted.

It is strenuously contended by the counsel of appellants that this decision is incorrect and ought to be overruled, but an examination has satisfied us of its correctness, and we consider it conclusive of this branch of appellant's case. The first and second grounds, therefore, upon which they ask for a reversal of the judgment cannot be maintained.

Nor do we think the third point is tenable. The bond recites that "a charge has been exhibited against the above named L. Loeb by the State of Louisiana for the crime of *arson*." The word *arson* has an unmistakable meaning. It is the voluntary and malicious burning of the house of another. Chitty on Criminal Law, p. 1121. With this offense the accused in this case was charged, and it is doubtful whether, under the law of 1858, under which the indictment was found, he was charged with anything more. See Acts of 1853, §§ 1, 2, 3.

But, in the case of Ainslie, cited above, where the accused was charged with uttering and publishing a false and forged order, and the bond recited only a charge of forgery, the court said that, if the offense was not accurately described, "still the condition was also that the accused should not depart without leave of the court, and having violated this condition of the bond, he and his sureties are equally bound," and cited *State v. Redding*, 8 Ann. 79, which, in turn, refers to 1 Chitty, Criminal Law, 103.

In the case at bar the bond contains the same condition.

For these reasons it is ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 62.—REUBEN WHITE, Under Tutor, v. VICTORIA E. NESBIT et al.

The sale of the property of a minor by the tutor, for Confederate notes as the consideration, is an absolute nullity; and the minor may sue for and recover back his property, or its value from the vendee after delivery.

APPEAL from the District Court, parish of Caddo. *Weems, J. Moncure & Flanagan*, for plaintiff and appellee, *Looney & Wells*, for defendants and appellants.

Howe, J. The plaintiff as under tutor of the minor, Robert Nesbit, instituted this suit against the natural tutrix, Mrs. Victoria E. Nesbit, and against the codefendant, Auguste Voinche, alleging that the latter pretended to have purchased from Mrs. Nesbit certain cotton, the property of the minor, and was about to remove it, and he prayed that the

 Reuben White, Under Tutor, v. Victoria E. Nesbit et al.

cotton might be sequestered and the rights of the minor thereto recognized and enforced. Alleging also various acts of unfaithfulness on the part of the tutrix, he prayed for her removal and the appointment of a tutor. In the progress of the suit this removal was made; and Thomas H. Pitts was appointed tutor, qualified, and permitted to prosecute the action.

The property sequestered was bonded by the defendant Voinche and delivered to him by the sheriff.

There was judgment in favor of the dative tutor, Thomas H. Pitts, against the defendant Voinche for the cotton sequestered, and in the event of its non-delivery for its value, with interest from the date of the judgment, and the defendant Voinche appealed.

The testimony in the case makes it sufficiently clear that the cotton in controversy was the property of the minor, a child of tender years; that the defendant Mrs. Nesbit undertook to sell it to Voinche on the fourth of February, 1864, for Confederate money; that during the absence of Mrs. Nesbit from the plantation, about December 10, 1865, Voinche attempted to remove it, and that it was sequestered at certain gin houses in the neighborhood. Under such circumstances the transaction as to the minor was a complete nullity, and could confer no rights whatever on the pretended vendee. The fact that the property had been removed by the vendee cannot avail him in this case. If Robert Nesbit had been of age and had himself been the vendor, the court declining to hear him allege his own turpitude, might have refused to interfere with the possession of Voinche, resulting from a sale, the consideration of which was illegal. But the minor in this case was no party to the pretended sale; and the maxim *nemo allegans*, etc., can not be opposed to the plaintiff.

For the reasons given it is ordered and adjudged that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 32.—SCHWARTZ, KAUFFMAN & Co. v. MARX BAER.

In order to avoid liability for the loss of cotton on storage, the warehouse keeper must show that the loss occurred without his fault. He can not be relieved by showing that the loss occurred by an overpowering force. He must also show that he used all possible means to preserve it.

APPEAL from the District Court, parish of Caddo. *Weems, J. John W. Jones*, for plaintiffs and appellees, *Looney & Wells* for defendant and appellant.

HOWELL, J. This suit is brought on the following instrument:

"The undersigned, Marx Baer, of Shreveport, La., acknowledges to be justly and lawfully indebted to Messrs. Schwartz, Kauffman & Co., of New Orleans, in the full sum of ten hundred and seventy dollars and

Schwartz, Kauffman & Co. v. Marx Baer.

ninety-one cents; for the liquidation of said debt, I hereby bind myself to hold, subject to the order of Schwartz, Kauffman & Co., an equivalent amount of cotton, at the rate of, say, ten cents per pound; said cotton to be delivered whenever called for, and as before stated, to be entirely under the control of Schwartz, Kauffman & Co., they paying me storage for holding the number of bales to cancel their claim against me, until such time as delivered to them or their order. The storage above to commence from this day, and the article of cotton to be that known in the market as middling quality.

“Done in New Orleans on the nineteenth day of February, 1862, and signed in presence of witnesses.

(Signed)

“SCHWARTZ, KAUFFMAN & CO.
“M. BAER.”

Plaintiffs ask for the delivery or value of the cotton.

Defendant, besides the general denial, alleges a discharge of his obligations, or delivery to and acceptance by plaintiffs of said cotton, and avers that by an overpowering force, after the weighing, marking and storing of the cotton in plaintiffs' name, it was moved from Shreveport beyond his control, and if it has been lost, it was not by his neglect. Judgment was rendered against him for \$3319 80, with costs, and he has appealed.

It is shown that, on the twenty-eighth of April, 1862, the defendant caused *twenty-two* bales of cotton weighing ten thousand five hundred and twenty-four pounds and then stored in the warehouse of Howell & Buckner, in Shreveport, to be marked for and transferred on the books of the warehouse to plaintiffs; took a warehouse receipt therefor and inclosed it on that day in a letter to plaintiffs in New Orleans. This letter appears not to have been received. The city of New Orleans was about that time taken possession of by the Federal forces, to the knowledge of defendant, while Shreveport remained in the possession of the Confederate forces until May or June, 1865.

This action of the defendant did not change his obligations to the plaintiffs, and did not amount to a delivery as contemplated by his agreement in writing. He was bound to hold the cotton subject to their order and control, and was entitled to storage until delivered to them or their order.

It appears that he had other cotton in the same and two other warehouses, and admitting that it was all removed by overpowering force, he was bound to give the same care to the cotton set apart by him for plaintiffs as to his own, and to be relieved from his contract with plaintiffs he must show that the cotton was lost without his fault. This he has not done. Having taken upon himself the custody of the cotton until delivered to plaintiffs, he was bound to use due diligence in preserving it for them, until that event, unless they were in fault in

Schwartz, Kauffman & Co. v. Marx Baer.

demanding it. They seem to have demanded it as soon as circumstances would permit, and defendant has not satisfactorily accounted for its non-delivery. Judgment should be changed so as to give him the alternative of delivering the cotton as is asked for in the amended petition and reserve to him the right to claim any storage due him.

It is therefore ordered that the judgment appealed from be reversed, and that plaintiffs have judgment against defendant for the delivery of ten thousand seven hundred and nine pounds of cotton, of middling quality, or, in default of such delivery, for the sum of three thousand three hundred and nineteen dollars and eighty cents, with legal interest from judicial demand, eighteen dollars cost of commission, and costs in the lower court, reserving to the defendant the right to claim storage according to the stipulations of the contract sued on. Costs of appeal to be paid by appellees.

No. 33.—J. M. JUILLARD v. MARX BAER.

A warehouse keeper gave a receipt to the depositor for cotton received on storage "with the stipulation in the receipt 'to be delivered in the same condition and order on presentation of this receipt or order.'" The depositor subsequently received a portion of the cotton, for which he gave a receipt. Held—That the presentation of the order and the delivery of a part of the cotton was a sufficient putting in mora of the whole amount to be delivered.

A PPEAL from the Tenth Judicial District, parish of Caddo. *Weems, J. Wright & Duncan*, for plaintiff and appellee. *Looney & Wells*, for defendant and appellant.

TALIAFERRO, J. The plaintiff sues the defendant on the following obligation :

"Received in good order and condition, for storage on my plantation, six miles above this place, for account of Mr. J. M. Juillard, of Paris, France, to be delivered in the same condition and order on presentation of this receipt or order (fire and war risks excepted) at the port of Shreveport, Louisiana, marks JJ., one to sixty-eight—(68) sixty-eight bales of cotton (32,000 pounds).

"M. BAER.

SHREVEPORT, LA., March 1, 1865."

The plaintiff on the twenty-seventh June following, indorsed upon this instrument the following :

"SHREVEPORT, June 27, 1865.

"Received from Mr. M. Baer, forty-six bales of cotton weighing 19,345 pounds, purchased of him.

"JUILLARD."

And below this indorsement Baer signed the following obligation :

"SHREVEPORT, June 27, 1865.

"I do hereby bind myself to deliver to Mr. J. M. Juillard 12,655 pounds of cotton, the balance due on the within bill of sale, within

J. M. Juillard v. Marx Baer.

thirty days from date, said cotton to be delivered to Mr. J. Juillard in Shreveport, free of charges, in bales and in good shipping order and condition.

"M. BAER."

The defendant filed a general denial. He avers that the contract was illegal and contrary to the laws of the United States, and contrary to good morals.

The plaintiff had judgment and the defendant appealed.

We see no force in the defense. It is not shown by proof that there was illegality in the contract. The ground taken in argument on the question of putting in delay is entitled to more consideration, but we are inclined to the opinion there was a sufficient putting in delay. The receipt "to be presented" as preliminary to the delivery, we doubt not was presented at the time the forty-six bales of cotton were delivered. This was a putting *in mora* for the whole amount to be delivered, and as the extension of thirty days was for the benefit of the defendant, no further demand or putting *in mora* was required.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

SUCCESSION OF C. W. STAUFFER. Opposition of KATE M. JONES et al.

A PPEAL from the Parish Court of the parish of Natchitoches.

Dissenting opinion of Mr. Justice Wyly:

I cannot concur in the opinion rendered by the court in this case.

I understand from the pleadings and the admissions of the parties that this is simply a contest for the distribution of a certain fund in the hands of the administratrix of the succession of Cyrus W. Stauffer, which fund was derived from the sale of the individual property of the deceased and his share of the goods and assets of the partnership of Stauffer & Co. It is merely a contest of the creditors for the fund. The opponents allege in their petition "that the assets of said succession are composed principally of the partnership property and the proceeds thereof;" and they pray that the claim of the widow and minor may be rejected, "as a privilege upon the general funds or assets of the succession," and that it be restricted to the fund arising from the sale of the individual property.

The record shows that the property inventoried in Stauffer's succession consisted of his individual property and his share of the goods and assets belonging to Stauffer & Co., which were sold and which constitute the fund now to be distributed. Among the admissions in the record is the following:

"It is further admitted that there is no property belonging to

the succession of said C. W. Stauffer except that contained in the inventory."

The issue before the court then, is, not whether the fund in question belongs to Stauffer's succession—that has been admitted—but the contest is how shall the fund be distributed?

The administratrix offers her tableaux setting out the amount on hand derived from the sources aforesaid, and placing therein the claims and rank of the different creditors competing for the fund, viz.:

First—Succession creditors, such as court charges, expenses of last illness, and the widow and minor's claim against the succession for \$1000, under act of 1852;

Second—Partnership creditors claiming a privilege on that part of the fund derived from sale of partnership assets;

Third—Ordinary creditors of the deceased.

The only question is, how shall these funds be distributed?

To which class of creditors shall they be paid; or which class shall have precedence on the tableaux?

Debts of a succession are of a higher dignity than those of the deceased and shall have preference. 10 L. 441; 3 M. 364.

The claim of the widow and minor is a succession debt. Stauffer owed them nothing. In like manner he owed nothing for funeral charges and court charges, but the succession owes them. The law has made the claim of the widow and minor a preference debt of the succession.

It only accrued when there was a succession, and its rank is fixed by law, which says: "the widow or legal representative of the children shall be entitled to demand and receive from the succession of their deceased father or husband a sum, which, added to the amount of property owned by either of them in their own right, will make up the sum of one thousand dollars, which amount shall be paid in preference to all other debts, except those for the vendor's privilege and expenses incurred in selling the property."

The law has specially given the widow and minor's claim precedence over funeral charges, expenses of last illness and all other debts of the succession, except the vendor's claim and expenses of selling the property.

The general law of commercial partnership gives partnership creditors a privilege and pledge on the partnership assets.

Under this law the opponents, who are admitted to be partnership creditors, have a preference on that part of the fund which the succession derived from the sale of partnership assets. They are nevertheless creditors of the succession, whose claims have been allowed and who are now claiming preference on a certain fund, just as a mortgage creditor would claim a preference on a fund derived from the sale of the property covered by his mortgage.

The rights of the opponents rest merely upon commercial law.

The rights of the widow and minor are based upon a special statute enacted as late as seventeenth March, 1852.

This I regard as a modification of the commercial law so far as it affects the rank of partnership creditors competing with succession creditors for a certain fund belonging to a succession.

But whether it be a modification, in this regard, of the commercial law or not, the statute of the State has been enacted and we are bound to enforce it. It is plain and clear. The widow and minor *shall demand and receive from the succession of the deceased father or husband* the amount fixed in the statute *in preference to all other debts*, except that of the vendor and the expenses of selling the property.

The authorities relied on by the opponents relate to the right of the partner or his creditors in the partnership property. They show that neither the partner nor his creditors, of whatever rank, can take precedence over the partnership creditors.

But the claim of the widow and minor is a succession debt, and not the claim of heirs or creditors of the deceased partner. I do not think the case of the United States v. Baulos applies to this case. That was only a privilege claim against the partner.

The whole question turns upon the fact which I consider the parties have conceded, to wit: does the fund in dispute belong to the succession of Stauffer. Of this I have no doubt.

"Succession signifies the estate, rights and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without property." Civil Code, 868.

Stauffer was individually or solidarily bound for all the debts of Stauffer & Co., and even without assets these alone would have constituted his succession.

I therefore consider that the fund in contest belongs to Stauffer's succession and should be applied to the claim of the widow and minor under the act of seventeenth March, 1852.

For the foregoing reasons I dissent from the opinion just rendered in this case.

NOTE—See opinion of the court reported at page 520.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

AT

OPELOUSAS.

SEPTEMBER, 1869.

PRESENT:

HON. JOHN T. LUDELING,	<i>Chief Justice.</i>
HON. J. G. TALIAFERRO,	} <i>Associate Justices.</i>
HON. R. K. HOWELL,	
HON. W. G. WYLY,	
HON. W. W. HOWE,	

No. 636.—EDWARD SIMON, Administrator v. WILLIAM F. HAIFLEIGH,
Sheriff, et als.

The burden of showing the incapacity of a judge to act as such, falls on the party who alleges such incapacity.

The stipulation in an act of mortgage of two per cent. to cover attorney's fees, if resort be had to legal proceeding, is made in favor of the creditor, and is collectable with the principal debt.

Negotiable notes, which are identified with the notarial act of mortgage given to secure their payment, make full proof of themselves.

APPEAL from the Third District Court, parish of St. Mary. *Gates, J. De Blanc & Perry, Gary & Fournet and A. L. Tucker*, for plaintiff and appellant, *Thomas J. Cooley and McMillan & Massy*, for defendants and appellees.

TALIAFERRO, J. The plaintiff obtained an injunction restraining the sheriff of the parish of St. Mary from selling certain lands seized by him under an order of seizure and sale directed to him, and rendered on the petition of several creditors of the plaintiff's father during his lifetime.

Edward Simon, Administrator, v. William F. Halfleigh, Sheriff, et al.

The grounds set forth for the injunction are various. It is alleged that the order was rendered by a person not legally in office as District Judge of the Fourth Judicial District at the date of the order; that, assuming to act in place of the Judge of the Third Judicial District, within which the property seized is situated, his action is null, for the reason that the Judge of the Third District had not resigned his office at the time of the rendition of the order.

That no authentic evidence was presented showing that at the time the order of seizure and sale was applied for and obtained, the Judge of the Third Judicial District was *functus officio*. That the two per cent. on the amount recovered, stipulated to be paid as attorney's fees in the event of compulsory proofs being resorted to, is not due to the plaintiff but may hereafter become due to the attorneys employed to prosecute the claims; and that the plaintiff in the case has *quoad hoc* no cause of action.

That the per centage as attorneys fees being contingent upon the amount recovered, no authentic evidence could be adduced showing the amount of the attorney's fees, and as regards this unliquidated claim an order of seizure could not legally issue.

It is also urged that there is no authentic proof of the transfer of the notes. The judgment of the lower court dissolved the injunction and awarded five per cent. damages in favor of the defendants against the plaintiff and his sureties. From this judgment the plaintiff appealed.

The plaintiff's allegation of want of legal right in the Judge of the Fourth District to issue the order, does not appear to be sustained by the evidence.

The objection that there was no authentic proof before him showing a vacancy in the office of District Judge of the Third District we do not think tenable. The fact which authorized him to act in the contingencies enumerated in the act of the Legislature of 1860, must be presumed to have been derived from sources altogether reliable. The presumption of the right has not been overturned by the plaintiff's evidence.

The act of mortgage recites that two per cent. shall be paid on the amount to be recovered if resort be had to legal proceedings, and this to defray attorneys' fees.

The sum thus fixed is ascertainable and capable of being made certain.

The attorney's fees thus provided for are exigible with the principal debt, and are stipulated in favor of the creditor to secure him against the expense he would necessarily incur, if, through the default of the debtor, he should be compelled to judicially enforce the obligation.

The notes sued upon are negotiable instruments drawn by the maker to his own order, and endorsed by him, and are identified with a nota-

Edward Shanon, Administrator, v. William F. Halfeligh, Sheriff, et al.

rial act of mortgage given to secure their payment in favor of the payee or any future holder.

It has been settled that such negotiable instruments accompanied with the act of mortgage make full proof of themselves.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

Rehearing refused.

No. 638.—STATE OF LOUISIANA v. EASTON HOFFPAUER.

All objections to the informalities which may have occurred, in the formation, drawing or summoning of the grand jury must be made on the first day of the term of the court and not afterwards. Revised Statutes, page 296.

Where the venire from which the grand jury is drawn is composed of legally qualified jurymen, it will not be set aside on objections made after the first day of the term.

APPEAL from the Eighth Judicial District Court, parish of Vermilion. *Bailey, J. E. D. Estilette*, District Attorney, for the State, *R. F. Patton, William & E. Moulton*, for defendant and appellant.

TALIAFERRO, J. The defendant in this case was indicted for assault and battery, found guilty and sentenced to pay a fine of five hundred dollars, or in default thereof to be imprisoned three months in the parish jail.

Previous to the trial the defendant by his counsel moved to quash the indictment on the ground that the grand jury which presented the indictment was not a legally constituted body for the reason that it was drawn from a venire that had been formed under a law which was repealed and not in force at the time the grand jury was drawn.

The motion to quash was overruled by the judge *a quo*, who assigned as ground for his action that the venire having been drawn before the law changing the manner of drawing juries in the parish of Vermilion was approved or took effect, it was properly drawn. That the objection, if a good one, came too late, as it should have been by challenge, to the array on the first day of the term. The appeal comes up on a bill of exceptions taken by the defendant to the ruling of the court.

The facts appear to be that the venire in question was drawn on the seventh day of March, 1866, under the act of 1855, which provides that the venire of forty-eight jurors to be drawn for an ensuing term of court shall be drawn from ballots taken from a list of *all* the qualified voters not exempt, of the parish. Revised Statutes, p. 294, sec. 3.

On the eighth day of March, 1866, the day after the drawing of the venire as above stated, an act of the Legislature was approved providing that in the parish of Vermilion the forty-eight jurors to be drawn prior to each term of the District Court shall be drawn from ballots taken from the names of *only one hundred and fifty* qualified

voters of the parish not exempted by law. This act repealed all former laws on the same subject matter, and took effect from the date of its passage. Acts of 1866, p. 114.

The grand jury that found the bill in this case was drawn on the ninth of April, 1866, from the venire drawn on the seventh of March preceding, under the law of 1855.

It seems clear that the drawing of the venire on the seventh of March was in every respect a legal act, having been performed under and in conformity with a law in force at the time the act was performed. But the law which legalized the act was not in force on the ninth of April following, when the grand jury was drawn having been repealed and suspended by another law in force on the ninth of April, and which is essentially different from the former law, especially in the matter of the formation of the venire. The venire however from which the jury was drawn was composed of persons competent to sit on juries, and the grand jury so drawn was composed of legally qualified jurymen. The informality objected to might have been successfully urged on the first day of the term, but that not having been done it was too late to interpose the objection afterwards. The act of 1855 (Revised Statutes, p. 296), provides that "all or any objections which might or could be made on account of any defects or informality which may have occurred either in the formation, drawing or summoning of juries, or any defect whatsoever in the construction of said juries shall be made on the first day of the terms of the said District Courts, and not afterwards. We think the judge *a quo* correctly overruled the exception.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

No. 729.—ELLEN EDWARDS AND HUSBAND v. FIELDING EDWARDS,
Natural Tutor.

21 610
105 485

The Parish Court is without jurisdiction where the amount involved is above five hundred dollars.

A judgment rendered by a court without jurisdiction *ratione materiae* is a nullity, and cannot be revised on appeal.

APPEAL from the Parish Court of the parish of Avoyelles. *Edwards*, Parish Judge. *Taylor & Thorpe*, for plaintiff and appellee, *A. B. Iron*, for defendant and appellant.

WYLY, J. The plaintiff sued the defendant, her natural tutor, for the value of the dotal property of her mother, estimated in the marriage contract at nine hundred and eighty dollars; also for a sum of money and the value of certain property donated (*propter nuptias*) by the defendant to her mother in said marriage contract; also to recover

Ellen Edwards and Husband v. Fielding Edwards, Natural Tutor.

the sum of one hundred and eighty-seven dollars and eighty-three cents received by the defendant in right of her mother, being an inheritance coming to the latter from the succession of her parents.

The defendant denied that the mother of plaintiff ever brought in dowery the sum claimed; also denied that he made the marriage settlement as alleged, and averred that he was then insolvent, and the declaration in the marriage contract that his wife brought to the marriage the sum named, was false and fraudulent, she being without funds; and the declaration that he made to her a donation on account of the marriage was also false and fraudulent, and intended to defraud his creditors, and that his deceased wife was a party to the fraud.

He also set up in compensation the amount of funds expended by him in support of the plaintiff, his daughter, and also the value of certain personal property which he has given her.

The court rendered judgment in favor of plaintiff for two thousand two hundred and twenty-five dollars and eighty-three cents, and recognized her tacit mortgage.

The defendant has appealed.

Our attention has been called to the fact that the cause was tried by the Parish Court which was without jurisdiction, the amount in dispute far exceeding the sum of five hundred dollars. Art. 87, Constitution. See the case of *Swan v. Gale*, and *Caulderwood v. Caulderwood*, decided at the Monroe term.

The appellee contends that the plea of want of jurisdiction should have been made before judgment by default.

The court will notice of its own motion at any time the want of jurisdiction *ratione materiae*.

The judgment of a court without jurisdiction *ratione materiae* is a nullity (C. P. 92, 609), and cannot be the subject of revision in this court.

It is therefore ordered that the judgment appealed from be reversed and annulled, and the suit be dismissed without prejudice to plaintiff's right to sue in a court of competent jurisdiction.

It is further ordered that plaintiff pay all costs.

No. 661.—JAMES S. ROBICHAUD v. SAMUEL T. THORNE.

The law makes no distinction in regard to prescription, between negotiable and non-negotiable promissory notes and bills of exchange.

A written order drawn by one person addressed to another directing him to pay to a third party a certain amount of money at a specified time is a bill of exchange and is prescribed by the lapse of five years from date of maturity.

APPEAL from the District Court, parish of St. Martin. *Gates, J. Gray & Fournet*, for plaintiff and appellant, *Edward Simon*, for defendant and appellee.

James S. Robichaud v. Samuel T. Thorne.

HOWELL, J. This suit was instituted on the following written instrument:

"April 30, 1860.

"MR. S. T. THORNE:

"You will please pay to Mr. James Robichaud, three months from date, the sum of six hundred and eighty-three dollars, as part payment of a note I hold against you bearing eight per cent. until final payment.

(Signed)

"ANTOINE ^{sa} ~~X~~ DEROUSSELLE,"
marque.

Witness:

(Signed) "JOHN STARK."

(Endorsed) Accept:

"SAM. T. THORNE."

The defense is the prescription of five years, which was sustained in the court below, and plaintiff has appealed.

He contends that the instrument sued on is not included in the provisions of article 3505, or the statute of 1852 amending it, because not negotiable or transferable by indorsement or delivery. Article 3505 reads: "Actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, are prescribed by five years, reckoning from the day when the engagements were payable."

"A bill of exchange is a written order or request by one person to another, for the payment of money, absolutely, and at all events." Bayley on Bills, ch. 1, § 1, p. 1: Kent's Comm. sec. 44, p. 74.

The quality of negotiability is not by our law essential to the instrument, "although, practically speaking, among merchants, it constitutes its true character." Story on Bills, p. 4, § 3. "Its form and language are greatly varied, and it will be sufficient, if it be in writing, and contain an order or direction by one person to another person, absolutely, to pay money to a third person, and cannot be complied with or performed without the payment of money." *Ibid.* p. 46, § 33.

Applying this definition, the instrument sued on in this case is a bill of exchange; and according to our interpretation of the above article of the code, it does not require that bills of exchange, to come within its disposition, shall be negotiable. The phraseology and punctuation of the article do not make the description of the notes, as payable to order or bearer, relate to the words "bills of exchange," and we are not inclined to restrict that class of instruments in the said article to such only as are negotiable, when the law does not do so. This construction is confirmed by the action of the Legislature in the statute of fifth March, 1852; for had the article referred only to such bills of exchange as are negotiable, they would doubtless have been also em-

James S. Robichaud v. Samuel T. Thorne.

braced in said statute, as there is no good reason why a non-negotiable note should be prescribed in a shorter time than a non-negotiable bill of exchange. We conclude therefore that the written instrument on which plaintiff has brought this action is subject to the prescription of five years.

It is therefore ordered, that the judgment appealed from be affirmed with costs.

No. 605.—JACOB COLE, JR., v. MARCELLUS HOCHA.

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The return of the sheriff on a citation served at the domicile of the defendant must show that the citation and copy of petition were served on a person of lawful age who resides at the domicile of the defendant at the time.

No valid judgment can be rendered against a party until he has been legally cited.

APPEAL from the Eighth District Court, parish of Calcasieu. *Bailey, J. Louis Leveque*, for plaintiff and appellee. *George H. Wells*, for defendant and appellant.

WYLY, J. The defendant has appealed from a judgment by default made final against him in the District Court, parish of Calcasieu.

I. He assigns as errors, apparent on the record, the insufficiency of the citation in not expressing, with certainty, the time within which he was required to answer.

II. Also the illegality of the sheriff's return thereon, in omitting to state that the person on whom he made the service resided at the domicile of the defendant.

The citation commands the defendant to appear at the next term of the District Court and comply with the demand of plaintiff "or file your answer thereunto in the office of the clerk of said court at the court house in the town of Charleston, if fifteen days shall remain between the time of service hereof and said term of said court, but if so many days shall not remain, then in fifteen days from the service hereof."

We think the citation complies with the requirements of the law. It contains much surplusage, but the defendant is summoned to comply with the demand of plaintiff or file his answer thereto within fifteen days from service. C. P. 179.

The sheriff's return however, is fatally defective; being a service at domicile it does not state that the person to whom the citation and copy of petition were delivered resided at the domicile of the defendant. C. P. 189; 3 A. 130; 16 L. 570, 594.

A default is a tacit joinder of issue based upon the presumed admission of the correctness of the demand; but a party who has not been legally cited cannot be presumed to have admitted any thing. He is not before the court.

Jacob Cole, Jr., v. Marcellus Hochs.

The appellee however contends that if there were informalities the defendant waived them by appearance made in the court *a qua*.

We find no appearance in the record that would cure a defective citation of the defendant.

All that the record discloses is a motion to set aside the default on the ground that the defendant had not been legally cited. The court overruled the motion and made the default final. We think the default in this case is illegal, that the defendant was not properly before the court, and that the judgment should be set aside for an error, apparent on the face of the record.

It is therefore ordered that the judgment appealed from be annulled and avoided, and it is now ordered that this cause be remanded to be proceeded in according to law.

It is further ordered that plaintiff pay all costs.

No. 705.—SUCCESSION OF JOHN M. RICE, deceased.—Opposition to application for the appointment of Dative Testamentary Executor.

A power of attorney given by a legatee, residing in another State, to collect a legacy, under a testament made in this State, creates a sufficient interest in said agent in the estate of the testator to entitle him to the appointment of dative testamentary executor. A dative executor will be appointed where it is shown that the executors named in the will have failed to qualify and the interest of the legatees require a representative.

A PPEAL from the Parish Court of the parish of St. Mary. *Handy*, Parish Judge. *J. G. Oliver & Dumartrait, Gibben & Wilson*, and *DeBlanc & Perry*, for appellants. *D. Caffrey, pro se*, appellee.

TALIAFERRO, J. This controversy arises from an opposition to the application of the appellee to be appointed dative testamentary executor of the estate of John M. Rice, deceased.

In August, 1860, John M. Rice, a resident of the parish of St. Mary, being temporarily in the State of Ohio and in declining health, made his will and named as his executors John B. Murphy and Joshua Baker. He made by his act of last will various legacies; among the rest, he gave to the children of his brother, William Rice, living in Ohio, one thousand dollars, and ten thousand dollars to the American Colonization Society. The testator died at his residence in the parish of St. Mary, in December, 1860.

Murphy and Baker, named in the testament as executors, presented to the proper court on the fifth of April, 1861, their petition praying that the will of the decedent be probated, executed and letters testamentary delivered to them. This occurred about the outbreak of the late war which caused a general suspension of business in the courts and no further action, it seems, was ever taken by the executors in regard to the will.

Succession of John M. Rice, deceased. Opposition to application for the appointment of Dative Testamentary Executor.

In September, 1867, Donelson Caffrey filed his petition in the District Court of the parish of St. Mary setting forth that Murphy, one of the executors, was dead, and that Baker, the other, refused to act. He alleged that he was authorized by William Rice, father of the children, who are legatees under the will, to have the legacy to them of one thousand dollars, paid. He prayed to be appointed dative testamentary executor of the will and for advertisement of his application. An order was rendered for advertising his application. An opposition was filed to this application by Feliciana Tremble, natural tutrix to her minor son, William W. Rice, sole heir at law of the testator, and in this opposition she was joined by her husband, James Todd, co-tutor to the minor. The opposition set up various objections to the will; that it had not been proved; that it did not make proof of itself—not being a noncupative will by public act; that until the will be proved no action could be taken in regard to the appointment of a dative testamentary executor, and that the act purporting to be a will is without any effect until it be established according to the provisions of law. On the thirtieth of October following, Caffrey filed a second petition in which he set forth that subsequently to the filing of his first petition he had become empowered to represent another of the legatees, the American Colonization Society. He prayed for the usual orders relative to the proof, registry and execution of the will, and that the opponents be cited, etc.

The will was duly ordered to be executed and recorded, and letters testamentary to be delivered to Donelson Caffrey as dative testamentary executor, and the opposition of the tutrix and co-tutor was dismissed at their costs—the costs of proceeding for the probating of the will to be sustained by the succession.

From this judgment the opponents have appealed. A bill of exceptions was taken by the opponents to the admission in evidence of a document copied by the clerk of the Appellate Court of the State of Maryland to be “a true and full copy” of the act of the Legislature of that State incorporating “The American Colonization Society” “as taken from the original law deposited in and belonging to the office of the Court of Appeals aforesaid.”

To this certificate is appended that of the Governor of the State certifying the capacity of the clerk, “and, as such, keeper of acts and resolutions of the General Assembly of the State,” and that full faith and credit are due and ought to be given to his acts as such. To this certificate is affixed the State seal.

The exception is founded upon the argument that if the clerk of the Court of Appeals is keeper of the original acts of the General Assembly, he is so by virtue of some law, and the law constituting him keeper is the best evidence of the fact. A document is presented pur-

Succession of John M. Rice, deceased. Opposition to application for the appointment of Dative Testamentary Executor.

porting to be an exact copy of an act of the General Assembly of the State of Maryland, certified as above stated, and containing upon it the great seal of the State of Maryland. The act of Congress of May 26, 1790, declares "that the acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto." We think in this case there is a sufficient compliance with the law of Congress, and that the objection was properly overruled. The authorization of the Colonization Society to Caffrey to act in its behalf is fully shown. He therefore shows an interest sufficient to entitle him to the dative testamentary executorship of the estate of Rice. We find no opposition to the application by Baker, the person named in the will as one of the executors. There is no other person contending for the office against the applicant. The opponents show no interest in the controversy themselves—more than two years had elapsed between the termination of the war and the filing of the petition of the applicant and this controversy lasted more than a year in the lower court and yet neither of the persons named in the will as executors have come forward to accept and qualify in that capacity. We think the opposition was properly overruled, and that the judgment was correctly rendered.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be affirmed with costs in both courts.

NO. 700.—MARIE CELESTE DERBY, Widow, etc. *v.* WILLIAM ROBERTSON, Testamentary Executor.

The Parish Court is without jurisdiction in a suit for a moneyed demand where the amount claimed is above five hundred dollars. Constitution, article 87; *Swan v. Gayle*, *ante*, page 478.

APPEAL from the Parish Court of the parish of Iberia. *Etie*, Parish Judge. *James A. Breaur*, for plaintiff and appellee. *DeBlanc & Perry*, for defendant and appellant.

TALIAFERRO, J. This suit was brought in the Parish Court of Iberia against the executor of Leonard J. Smith, deceased, upon three several promissory notes, each for the sum of three thousand dollars, with interest, and secured by mortgage on a tract of land in that parish. The defendant filed an exception to the jurisdiction of the court, which being overruled, he answered, and the case going to trial, judgment was rendered as prayed for, and the defendant has appealed.

The exception should have been sustained. See the case of *Swan v. Gayle*, decided at the late term of this court at Monroe, 21 An. page 478.

It is therefore ordered, adjudged and decreed that the judgment of the Parish Court be annulled, avoided and reversed. It is further ordered that this suit be dismissed at plaintiff's costs.

No.—663.—ACHILLE BESSAN et als. v. ALEXANDER MOUCHEUX et als.

A sold the contents of a coffeehouse to B and C, for which B and C gave each their notes for one-half of the price. B gave a mortgage to secure the whole debt on his own property, and afterwards, at the maturity of the notes, paid one of them, and made a payment of one-half of the amount of the other. C subsequently transferred his one-half interest in the coffeehouse to B, for a fixed price. A brings suit by executory process to recover the balance of the outstanding note; B enjoins on the grounds of extinction of the debt and mortgage. Held—that the transfer from C to B, of his one-half interest in the coffeehouse was not a *datien en paiement* but a sale, and that the property mortgaged not being the same as that sold from one co-debtor to the other, the debt was not extinguished by confusion.

A PPEAL from the Parish Court of St. Martin. *Gates, J. F. Fusilier*, for plaintiffs and appellants. *Gary & Fournet and DeBlanc & Perry*, for defendants and appellees.

LEDELING, C. J. The plaintiffs obtained an injunction to restrain the defendants from executing an order of seizure and sale. The defendant Moucheux sold to Achille Bessan and Pierre Susena the contents of a coffeehouse in the town of New Iberia, in 1860, for \$2500, and the purchasers executed their joint and several notes, each for \$1250, and due respectively on the tenth days of January, 1861 and 1862. To secure the payment of these notes Bessan gave a mortgage on property belonging to him. Shortly after the maturity of the first of these notes Bessan paid it, and on the twenty-sixth day of April, 1862, Bessan paid one-half of the other note.

The order of seizure and sale was issued to enforce the payment of the balance due on the second note. Of the many grounds alleged for the injunction it will be necessary to notice only one; that is, was the debt extinguished by confusion or by a *datien en paiement* as alleged by the plaintiffs?

The other grounds were personal to Bessan, and the judgment in his favor is unappealed from.

The act from which it is inferred that the debt was extinguished was the transfer to Moucheux of the undivided half interest of Susena in the coffeehouse, in April, 1861. The act evidencing this transfer recites that Susena had sold to Alexander Moucheux his interest in the coffeehouse for twenty-three hundred dollars—fifteen hundred dollars cash, and eight hundred dollars to be paid in ninety days. There is certainly nothing in this to indicate a *datien en paiement*. Nor does the testimony of Bessan himself tend to prove a giving in payment. He says, “P. Susena a rendu sa part du café à Monsieur Alexander Moucheux, et que Mr. Moucheux avait acheté le café, et qu’il se mettait au lieu et place de Mr. Susena, et que Mr. Moucheux se rendait responsable des dettes du café, pour toutes les réclamations qu’on pouvait avoir contre le café.”

The contract was a sale evidently.

Neither was the debt extinguished by confusion. The property

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bought by Moucheux was not the property which was mortgaged to secure the debt due him—nor did he assume to pay the mortgage debt—"Il se rendait responsable des dettes du café." The judgment of the District Court is sustained by the evidence in this case.

It is therefore ordered, and adjudged that the judgment of the court *a qua* be affirmed, and that the appellant pay the costs of appeal.

NO. 650.—ZENON BROUSSARD v. ALEXIS O. GUIDRY AND LUCIEN J. DUPRE, Administrator, etc.

Where one judgment debtor in *solido* appeals from the judgment without making his co-debtor a party, the appeal will be dismissed for want of proper parties.

APPEAL from the District Court, parish of St. Landry. *Bailey, J. John E. King*, for plaintiff and appellee. *Moore & Morgan*, for defendants and appellants.

Howe, J. The judgment in this case was rendered against Guidry, and Dupré, administrator, *in solido*, upon a promissory note made by Guidry and Cyprien Dupré, *in solido*.

The administrator alone has appealed, and has not made Guidry a party to the appeal. The court will *ex officio* notice the want of proper parties. *Swearingen v. McDaniel*, 12 Rob. 203; *Robert v. Ride*, 11 Ann. 409; *Simmons v. His Creditors*, 12 Ann. 755; *Gibson v. Selby*, 3 Ann. 318; *Lobelle v. Lobelle*, 5 Ann. 174; *Cotton v. Sterling*, 19 Ann. 137.

It is therefore ordered that the appeal herein be dismissed with costs. Rehearing refused.

NO. 635.—JOSEPH POTIER v. ISAAC E. THIBODEAU et al.

The appeal will be dismissed where the failure to cite one of the appellees is imputable to the appellant.

APPEAL from Third District Court, parish of St. Martin. *Gates, J. Felix & Albert Voorhies*, for plaintiff and appellee. *DeBlanc & Perry*, for defendants and appellants.

WYLY, J. A motion is made to dismiss this appeal because all the parties to the judgment have not been made parties to the appeal.

It appears from the record that the codefendant Isaac E. Thibodeau, has not been cited or made party to the appeal. The appellant did not ask that he be cited. The order of appeal was granted on twenty-fourth October, 1866. It was the duty of appellant to cause his appeal to be compelled by citing or causing to be cited the parties to the judgment within twelve months from the rendition thereof. The fault is imputable to him.

It is ordered that this appeal be dismissed at appellants' costs.

Emile Tanneret v. Thomas D. Marshall.

No. 625.—EMILE TANNERET v. THOMAS D. MARSHALL.

Delivery is of the essence of a contract of deposit, and where cotton was to be weighed, no delivery could take place until it was weighed.

Where the evidence shows that a sum was paid in Confederate notes for a lot of cotton, no action will lie to enforce the contract for the recovery of the cotton or its value. Constitution, article 177.

APPEAL from the Parish Court of Avoyelles. *Lewis, J. E. North Oullom*, for plaintiff and appellee. *Waddill & Burbin*, for defendant and appellant.

TALIAFERRO, J. The plaintiff sues upon a contract, as he avers, of deposit, alleging that he left in the month of December, 1863, with defendant as his depositary for storage and safe keeping, forty thousand pounds of lint cotton; and that having the bagging and rope necessary for baling the cotton, demanded it of defendant, who refused to deliver it. He therefore demands the delivery of the cotton, or in default thereof prays judgment against defendant for thirty thousand dollars.

The answer is a general denial. The defendant specially denies the alleged contract of deposit. He admits having agreed to sell to the plaintiff cotton for which he received eighteen thousand dollars in Confederate money; but that he never delivered to the plaintiff any cotton in pursuance of the agreement, and that he offered to return the Confederate money which plaintiff refused to receive. He avers that the consideration having been an illegal currency, the agreement was null, and that he is not bound by it. The plaintiff had judgment, and the defendant appeals.

It is clear that there was no contract of deposit. The witness Coco, introduced by the plaintiff, states that neither he, as the agent of the plaintiff, nor the plaintiff himself, had the cotton in their possession or control. That neither he nor the plaintiff ever saw the cotton, and that it was never weighed. The cotton, when he purchased it, was in the seed. The undertaking of the defendant, it seems, was to deliver to Coco, as the plaintiff's agent, forty thousand pounds of lint cotton whenever plaintiff procured the necessary baling and rope to pack it.

To form the contract of deposit, there must be a delivery, the principal object of which is to take care of the thing deposited. As cotton "in the lint" was to be delivered, and a specific number of pounds, no delivery can be said to have been made as no weighing ever took place. The witness and agent Coco deposes that he does not know that the cotton was ever ginned. No delivery in legal contemplation having been made to the plaintiff or his agent, no delivery by the plaintiff nor by his agent could be made to the defendant so as to constitute the latter the plaintiff's depositary.

It clearly appears from the evidence that the consideration for which the defendant agreed to sell the cotton was eighteen thousand dollars

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in the illegal currency of the so-called Confederate States. The plaintiff's agent and witness says that he paid for the cotton forty-five cents per pound in Confederate money, and that he counted to defendant eighteen thousand dollars.

This court has repeatedly refused to lend its aid to the enforcement of contracts of this kind.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that judgment be and it is hereby rendered in favor of the defendant, releasing him from the obligation sued upon. The plaintiff and appellee paying costs in both courts. Civil Code, article 2297, 1 L. R. 494; *Schmidt v. Barker*, 17 Ann. 261.

No. 717.—PINCKNEY C. BETHEL *v.* JOSEPH T. HAWKINS.

A conversation between one party to a contract and a third party, out of the presence of the other party, is inadmissible on a trial in a suit to enforce the contract.

A loan of Confederate money or notes, as shown by the act of mortgage given to secure the payment, cannot be enforced by the courts of this State. Constitution, article 127.

A party accepting a mortgage to secure the payment of a debt, is bound by the terms and cases in which it is expressed.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. Tucker & Davis, J. G. Oliver & Dumartrait*, for plaintiff and appellee. *M. E. Girard*, for defendant and appellant.

TALIAFERRO, J. In June, 1865, this suit was filed by the plaintiff, who prays judgment against the defendant on his two promissory notes with the interest thereon, each for the sum of \$7500, dated the eighth of May, 1862, payable respectively in two and three years after date, with interest at eight per cent. per annum from date. He also prays a decree enforcing the mortgage given to secure the payment of the notes so far as relates to the land described in the act. By supplemental petition, filed twenty-third April, 1868, the suit was revived against the widow and natural tutrix of her minor children, the defendant having died during the pendency of the suit. The answer is a general denial. Judgment was rendered as prayed for with an order that the land mortgaged be seized and sold to satisfy the debt. The defendant has appealed.

The consideration for which the notes were given was a loan of Confederate money as expressed in the act of mortgage. The plaintiff aimed to evade the effect of this declaration by introducing himself as a witness, detailing conversations had with the defendant before and at the time the loan was made, and subsequently going to show that the loan was made by furnishing the borrower exchange in drafts and checks. This testimony was objected to by the defendant, and the objection being overruled he took a bill of exceptions. We do not

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think it important to pass upon this bill of exceptions, as the testimony is insufficient to rebut the recital in the act of mortgage.

A second bill of exceptions was taken by the defendant's counsel to the ruling of the court admitting that part of the plaintiff's evidence which is in these words: "Witness at once protested (on seeing the mortgage), and told the recorder that it was not the understanding or agreement between defendant and himself. That witness wanted the mortgage to be altered or a new mortgage given, leaving out the words 'Confederate money,' as the money given was not Confederate money, and witness wanted to carry out the original contract." What the plaintiff said to a third party, out of the presence of the defendant, he could not give in evidence, and the testimony should have been rejected. 12 An. 179; 5 L. 414; 11 An. 503, and 3 An. 280.

The act of mortgage was executed before a notary and two witnesses on the eighth of May, 1862, the same day the notes were given, and they are identified with the act of mortgage by the notary's *paraph ne varietur*. The defendant's wife, authorized by the husband, joined in the act and made a renunciation of her rights upon the property mortgaged. These acts were required by the plaintiff to be done before the money was advanced. It appears that the plaintiff is a resident of Memphis, Tennessee, and was so at the time the loan was made. He was not present when the act was executed, nor was there any person present who accepted the mortgage for him. But the plaintiff seems to have acquiesced in the act, for he says in his own testimony that "defendant came to witness' home with the notes, telling witness that the defendant had given the mortgage with the renunciation of his wife; witness then let defendant have the balance of exchange, either in drafts or checks, etc." In his own testimony there is plainly a studied evasion in stating the time at which he first saw the mortgage. He says: "Witness then, sometime thereafter (meaning the time he gave defendant the drafts, etc.), was at Franklin, and went to see the records." But an allegation in the petition is more definite as to the time when he protested to the notary and required the words "Confederate money" to be stricken out of the act or a new mortgage given. The petition sets out "that the note being due, and the troubles which for several years had agitated the country having passed away, your petitioner demanded of said Hawkins a compliance with his obligation, but was answered by said Hawkins that payment would not be made on the ground that the money loaned to him by your petitioner had been so loaned in Confederate bills or notes. That your petitioner, having then examined the act of mortgage, etc., discovered the allegation by said Hawkins in said act, that said loan of \$15,000 had been made in Confederate currency." The plaintiff affects now to accept the mortgage according to what he says was the original agreement, namely, that he loaned the defendant \$15,000 "in good current funds,

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on condition that defendant would execute a mortgage on his land and slaves." He can only accept the act of mortgage in the terms and sense in which it is expressed. The law is plain on that subject. Civil Code, articles 1792, 1795, 1799. If he has not accepted the act according to its terms there is no contract, and he can not proceed with his case; if he has accepted in the only way in which he could accept, he is bound by the act and cannot gainsay its meaning and purport. There is no ambiguity in the terms used and no room for extraneous aid to interpret them. He is endeavoring to enforce a contract, the consideration of which was "Confederate currency." The nullity of contracts founded upon that unlawful currency has been frequently determined.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that this suit be dismissed at the plaintiff's costs.

ON APPLICATION FOR REHEARING.

LUDELING, C. J. The question presented in this case for decision is, was the consideration of the obligations sued on Confederate money or not?

For the purpose of this inquiry we considered all the evidence in the record, and we came to the conclusion that the averment made in the authentic act of mortgage, that the money loaned was Confederate currency, was true.

In the brief of the counsel for the appellee, it is earnestly urged "that the evidence contradicts the statements made in the act, that it shows that at least \$7885 was in *bank checks*, transferred by the plaintiff to the defendant, and by the latter transferred, without discount, to his creditors in payment of his debts due before the war." The testimony of Fassit does prove that checks marked A. B. & C. were given to him by the defendant in payment of debts due by defendant before the war.

But this does not contradict the statement in the act of mortgage, that the loan was of Confederate currency, for it is proved beyond a reasonable doubt that *these checks were themselves drawn against Confederate currency*. These checks were drawn by the Bank of Tennessee on the Union Bank and the Citizens' Bank of New Orleans, and they were dated early in March, 1862; two of them expressly state that they are payable *in currency*.

Louis Monroe says: "I deposited said check in the Citizens' Bank, but received from said bank *Confederate money* for said check, by checks drawn on said bank." "I received Confederate money for said checks; the currency of New Orleans then was Confederate money, and was also bankable paper at that time."

George Freret, cashier of the Union Bank, says, "the original of the

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copies marked A. & B. were paid by the Union Bank, upon presentation, in *Confederate currency*," * * * "which was the currency of the city of New Orleans at that time."

Felix Morris says, the checks "marked A. & B. must have been paid in currency. *The bank paid nothing but currency.* The currency at New Orleans at the time of payment, was Confederate States notes, which Confederate States notes were bankable funds."

Charles Cammack, the teller of the Citizens' Bank, says the original of the copy marked C. was received by the Citizens' Bank, *on deposit*, April 17, 1862, and was credited to the last indorser, Robert Hare. The check "was placed to the credit of R. Hare in *currency, which at that time was Confederate money.*"

R. Hare says: "I recognize the copies marked A. & C. The originals of said copies, marked A. & C. passed through my hands and were credited to the account of C. R. Fassit." "The original drafts were paid on presentation, and placed to my credit in the Citizens' Bank, and paid by said Citizens' Bank by checks drawn by me in the ordinary course of business, *payable in currency, which at that time was Confederate money.*"

Is it possible for any one to doubt as to what was the fund against which these checks were drawn? See *Foster & McAlister, executors, v. The Bank of New Orleans*, 21 An. 338.

The counsel for the appellee in his brief for a rehearing would seem to contend that the plaintiff loaned *checks* and not money.

The judicial admissions made in plaintiff's petition is, that he "loaned to Joseph T. Hawkins *the sum of fifteen thousand dollars.* He regarded the checks, then, as representatives of money, and the evidence shows that they were so, but of *Confederate money.*

The reason why this court has held that contracts for Confederate money should not be enforced was because they were contrary to public policy, and not because the money or notes had no value. Therefore, whether defendant paid his debts with the checks or not is immaterial in deciding this case.

We do not think this case similar to the case of *Weaver v. Anfau*. In that case the court said: "Nothing shows here that any part of these checks has been paid in Confederate money; to believe so it would be surmising and conjecturing, when the law requires evidence so complete that it carries with it conviction upon the mind of the court. Can we say, or can any one say, that Confederate money was paid on those checks?"

The proof in that case did not satisfy the court—in the case at bar it is full and satisfactory.

The evidence satisfies us that the plaintiff knew the checks would be paid in Confederate currency.

The rehearing is refused.

 Marie Odile Begnaud v. Alexandre Roy.

No. 659—MARIE ODILE BEGNAUD v. ALEXANDRE ROY.

The transferees of portions of a mortgage debt are entitled to be paid *pro rata*, out of the proceeds of the sale of the property mortgaged, without regard to the time when the transfer was made.

APPEAL from the Parish Court of St. Martin. *Yates, J. DeBlanc & Perry* for plaintiff and appellee. *Gary & Fournet* for defendant and appellant.

LUDELING, C. J. The defendant, who is the holder and owner of two of a series of notes secured by a mortgage, obtained an order of seizure and sale against the property mortgaged.

Before the sale, the plaintiff, who holds another of the notes secured by the same mortgage, filed a third opposition, claiming the right to be paid by preference out of the proceeds of the sale of the property mortgaged, because she acquired her note before its maturity, and that the defendant acquired his notes subsequently and after their maturity.

There was judgment in favor of the plaintiff ordering the sheriff to pay her the amount of her claim by preference, and the defendant has appealed.

We had occasion to examine this question recently, and we held that the transferees of portions of a mortgage debt are entitled to be paid, *pro rata*, out of the proceeds of the property mortgaged without regard to the time when they were transferred. We adhere to that position. See *Perot v. Levasseur*, 21 A. 529.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed; it is further ordered that the proceeds of the property mortgaged be distributed proportionally on all the notes secured by the mortgage, and that the plaintiff and appellee pay the costs of both courts.

 649.—ANATOLE COCO v. JAMES CALLIHAN.

A third holder of a negotiable paper before maturity, in good faith, for a valuable consideration, can recover thereon, unless it is shown affirmatively that the original consideration was illegal.

A promissory note, given for Confederate money as the consideration, cannot be enforced in part, predicated upon an assumed value of the illegal currency at the time, when compared with legal currency.

APPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Lewis, J. Waddill & Barbin* and *H. Taylor*, for plaintiff and appellant. *E. North Cullom*, for defendant and appellee.

TALIAFERRO, J. The plaintiff, as endorsee of a promissory note, drawn by the defendant on the sixteenth May, 1863, for \$5000, payable to the order of Charles Arnold, brings this action to recover its amount.

The defense is, illegality of the contract and failure of consideration. The plaintiff had judgment for a part only of the sum claimed. Both parties have appealed.

The facts as we find them in the record, seem to be that, during the late war and a short time before the march of a United States army through the parish of Avoyelles, the defendant, in order to protect his property, effected a sham sale of it to Arnold, the payee of the note, and contracted to pay him \$5000 (the consideration of the note) to secure the property from damage and spoliation under the pretext that he was a subject of a foreign country friendly to the United States. The stratagem, however, did not succeed, at least only to a very limited and unimportant extent.

The note, it appears, was transferred before its maturity to the plaintiff. The only important question in the case is, did the plaintiff acquire the ownership of the note *bona fide* for a valuable consideration before its maturity and without knowledge of equities and exceptions existing between the prior parties? A number of facts is shown on the part of the defendant tending in some degree to fix upon the plaintiff a knowledge of the whole transaction out of which the contract between the defendant and Arnold had its origin, and that he knew when he acquired the note what was the consideration for which it was executed, and that the consideration had failed. But these facts are not clear and direct, although they are mighty and forcible. They would seem to warrant the inference of knowledge contended for by the defendant; and apart from other evidence in the record, might amount to constructive knowledge, as it is frequently termed, of the equities set up by the defendant. But in juxtaposition to the array of circumstances from which the evidence at last would only be inferential, we have the positive, direct and unequivocal evidence of the plaintiff himself in his answers to interrogatories propounded to him by the defendant, denying emphatically any and all knowledge of the consideration of the note, or of the failure of the consideration. He swears directly that he gave a valuable consideration for the note, and it is shown by another witness that plaintiff acquired the note before its maturity. The defendant has not rebutted these answers of the plaintiff in the manner required by law, and their damaging effect to the cause of the defendant is not obviated. C. P. art. 354.

The Judge of the Court below took this view of the evidence, and in it we concur. But we do not concur with him as to the basis upon which he rendered his judgment. He assumed that Confederate money was contemplated by the parties as the currency in which the note was to be paid, and therefore proceeded to estimate the value of that currency at the maturity of the note, as measured by gold and United States Treasury notes, and found the mean value to be sixteen dollars of Confederate money for one of United States Treasury notes, and rendered judgment accordingly. There is no sufficient evidence before us to render it entirely clear that the illegal currency, termed Confederate money was the currency in which, by intention of the par-

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ties, the note was to be paid. If any weight is to be attached to the declaration of Arnold, the payee of the note, it would appear that he contemplated something better in payment than Confederate money; for he said, "he had the note made payable six months after date for the reason that the war would be over in six months; we would lose our cause and the money would be good." On the face of the note is expressed that the \$5000 are to be paid "in current money." We do not find in the record evidence sufficiently strong to overcome the presumption that "current money" meant lawful currency.

In no sense was the Judge of the Court below authorized to render a judgment predicated upon an assumed value attached to the illegal currency called Confederate money. The note is either good for its whole amount or null for the whole. Conceiving that we should, from the evidence, hold it to be good in the hands of the plaintiff, judgment, we think, should be rendered for the whole.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the plaintiff recover from the defendant five thousand dollars with five per cent. interest thereon from the 16th November, 1863, and that defendant pay costs in both courts.

620.—JOHN A. TAYLOR v. JAMES C. HILL.

In an appeal from an order of seizure and sale, the Supreme Court will limit their examination to the validity of the order.

An order of seizure and sale granted on notes that were prescribed at the date of the order, will be set aside on appeal.

The maxim, *Contra non valentem agere non currit prescriptio*, cannot be invoked by the holder of a promissory note to defeat the plea of prescription. *Smith v. Stewart*. 21 An. 67.

APPEAL from the Eighth District Court, parish of St. Landry. *Bailey, J.* *James M. Porter* and *King & Martin* for plaintiff and appellee; *J. M. Moore* for *Donnell* and *Nelson*, appellees. *John H. Overton* for defendant and appellant.

WYLY, J. This is an appeal from an order of seizure and sale sued out by the plaintiff against the property of the defendant.

After the property had been sold, but within the twelve months, the defendant took this devolutive appeal.

I. He assigns as errors that the notes secured by the mortgage were prescribed when the order was granted, being more than five years past due;

II. That the notes and mortgages, upon which the order was granted, were not stamped as required by act of Congress, and therefore were inadmissible as evidence;

III. That the sale and adjudication of the property to *W. S. Donnell & Co.* was illegal and void, vesting no title, because they were first

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mortgage creditors and the property was adjudicated to them at a sum exceeding their debt interest and costs, yet the mortgage notes evidencing the indebtedness were neither canceled nor delivered to the appellant, although extinguished and paid by the amount of their bid.

For these reasons the appellant asks that the order of seizure and sale may be reversed, that the sale of his property may be set aside, and that he may be reinvested with possession thereof. He caused the purchasers, W. S. Donnell & Co., also to be made parties to the appeal.

In this appeal, we can only revise the order of seizure and sale granted by the Judge *a quo*; we have not original jurisdiction to consider irregularities in executing the decree occurring subsequent thereto. 6 R. 58.

The appellees, W. S. Donnell & Co., were not parties to the order appealed from, nor were they interested therein, and as to them the appeal must be dismissed.

If the stamps were necessary to make the evidence legal, as urged by the appellant, in the absence of proof to the contrary, we will presume that they were attached to the notes when the order was granted; the District Judge is presumed to have done his duty. Upon the face of the papers the order appears to have been properly granted, being based upon authentic act and authentic evidence.

In reference to the plea of prescription of five years, filed in this Court, we find in the record that it is well taken as to two of the notes, which were more than five years past due when the order was granted.

In reference to the "*contra non valentem*," etc., doctrine, urged in bar of the prescription pleaded, we have held in the case of *Smith v. Stewart*, 21 A. 67, that it is simply a rule of equity which we cannot permit to set aside the written law expressed in Art. 3505 of the Civil Code. Where there is no express law we can decide according to equity. C. C. 21.

In regard to the act suspending prescription, passed by the so-called Legislature at Shreveport in 1863, invoked by the plaintiff, we can say that it forms no part of the laws of this State. That Legislature was an organization of the rebel government, an illegal body; its members were not acting under the solemnities of an oath to support the Constitution of the United States, and all of its proceedings are illegal and void.

It is therefore ordered, adjudged and decreed that this appeal, as to W. S. Donnell & Co., be dismissed; that the order appealed from be reversed and set aside as to two of the notes declared upon, to wit: the one due twelve months from date, and the other due two years from date, both dated the seventeenth April, 1858, for \$2188 14½ each,

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with eight per cent. interest per annum on each from date. As thus amended, it is ordered that the order of seizure and sale be affirmed.

It is further ordered that plaintiff pay costs of appeal.

702.—CHARLES E. HEIDENREICH v. SAMUEL LEONARD *et al.*

A note given by a conscript in the so-called Confederate army to another party, to serve in his place as a substitute, is illegal, and no action lies to enforce it. 19 An. 439.

APPEAL from the Third District Court, parish of St. Mary. *Gates, J. Tucker & Davis* for plaintiff and appellee. *J. G. Oliver* for defendants and appellants.

WYLY, J. The defendants have appealed from a judgment against them based on a promissory note dated July 9, 1862, for \$1000.

The defense is, that the motive or cause of the obligation evidenced by the note, is immoral and against public order, it being for the hire of plaintiff to serve as a substitute for the defendant Leonard in the army of the Confederate States.

The evidence shows that Leonard was a conscript in Camp Pratt when he made the note, that he employed the plaintiff to serve as a substitute for him in the war of the rebellion, and that the note had no other consideration.

The obligation had an unlawful cause and can have no effect. C. C. 1887; 19 A. 439, 449.

It is therefore ordered that the judgment appealed from be reversed and annulled, and it is now ordered that there be judgment for the defendant, plaintiff paying all costs.

No. 665.—WILLIAM CAMPBELL, Administrator, v. CLAIRE THIBODEAUX, Widow, etc.

The ambiguity in the testimony of a witness will be so construed as to harmonize with the view taken of it by the Court *a qua*.

APPEAL from the Parish Court of Lafayette. *Bailey, J. M. E. Gerard* for plaintiff and appellee. *James A. Breaux* for defendant and appellant.

LUDELING, C. J. This action is instituted on a promissory note, to which the defendant affixed her mark. The judgment by default was made final after the legal delays, and the defendant has appealed.

The only question presented in this case is, whether the mark of the defendant has been proved. We think it has. The attesting witness says "that he was the witness to the signature to the note marked A, and that Claire Moss is Claire Thibodeaux, widow J. W. Moss." The District Judge, who heard the witness, considered the signature proved,

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and, if there was ambiguity in the language of the witness, we would be inclined to interpret it so as to sustain the correctness of the action of the Judge *a quo*.

It is therefore ordered that the judgment of the District Court be affirmed with costs of appeal.

No. 650.—VALERY M. GUILBEAU, Administrator, v. ZEPHYRIN CORMIER and ALEXANDER ROY.

A third party on appealing from a final judgment on the ground of his liability to contribute, must cite the plaintiff and defendant as appellees, otherwise the appeal will be dismissed for want of proper parties.

The fact that the name of the defendant is inserted in the appeal bond will not supply the defect.

The omission to ask for citation of the defendant in the petition for appeal, is imputable to the appellant.

APPEAL from the District Court, parish of St. Mary. *Gates, J. Felix Voorhies* for plaintiff and appellee. *Gary & Fournet* for defendants and appellants.

Howe, J. This suit was instituted upon a promissory note executed *in solido* by Cormier & Roy. The latter alone was cited, and judgment was taken against him by default and made final. Cormier, as a third party liable to contribution, appealed.

The plaintiff, appellee, has moved to dismiss the appeal on the ground, among others, that the defendant Roy, against whom the judgment was rendered, has not been made a party. The appeal was taken by petition, which does not ask for the citation of Roy, nor was he cited. The fact that his name was inserted in the bond does not supply the defect; and the fact that the petition did not request that Roy be cited causes the defect to be attributable to the appellant. The motion must prevail. *Gibson v. Selby*, 3 Ann. 318; *Lobelle v. Lobelle*, 5 Ann. 174; *Cotton v. Sterling*, 19 Ann. 137; *Saux v. Lefevre*, 12 Ann. 757.

It is therefore ordered that the appeal herein be dismissed with costs.

No. 652.—CELESTINE DUPUY, wife, etc., v. VALIERE ARCENEUX.

A judgment by default that has been improperly made final because of defective citation, will be set aside on appeal, and the cause will be remanded.

A citation must express the number of days given the defendant to answer according to the distance from his residence to the place where the Court is held, to be reckoned from the date of service. C. P. 179, § 5.

APPEAL from the Third Judicial District Court, parish of St. Martin. *Gates, J. DeBlanc & Perry*, for plaintiff and appellee. *Gary & Fournet*, for defendant and appellant.

Celestine Dupuy, wife, etc., v. Vallere Arceneaux.

LUDELING, C. J. This is an action on two promissory notes. The judgment by default was made final, and the defendant has appealed.

Our attention has been directed to the following errors apparent on the face of the record; that the citation does not express the year in which defendant is to answer; that the citation expresses that the defendant must file his answer *in ten days*, while the sheriff's return shows that the defendant's residence is twenty-two miles from the court house.

Article 179 of the Code of Practice, section five, requires that the "citation *must express the number of days* given to the defendant to file his answer, according to the distance from his residence to the place where the court is held, to be reckoned from the day when the citation was served."

In Kendrick's Heirs v. Kendrick, this Court held that "the citation should have stated that the answer was to be filed within ten days after service, and *allowing one day for every ten miles distance from the residence of the defendant to the clerk's office.*"

In Leeds v. Debuys, 4 R. p. 258, the Court decided that "before a court permits a judgment by default to be made final, it must be satisfied that the defendant has been *duly cited*; but it suffices that it appears that he was so, by the inspection of the citation and return."

By an inspection of the citation and return thereon, it appears that the defendant was not duly cited. The default was improperly made final, and must be set aside.

It is, therefore, ordered and adjudged that the judgment of the District Court be avoided and reversed, and that the case be remanded to the District Court to be proceeded with according to law. It is further ordered that the appellee pay the costs of this appeal.

21 630'
49 1320'

No. 670.—LOUIS DELILE ARNAULT, Administrator, v. PAUL LEON ST. JULIEN.

In a service of citation at domicile, the sheriff's return must show that the defendant was absent at the time, and that the person with whom the citation was left, was living there. No legal judgment can be rendered on a defective citation.

APPEAL from the Eighth District Court, parish of Lafayette. *Bailey, J. DeBlanc & Perry* for plaintiff and appellee. *M. E. Gerard* for defendant and appellant.

WYLY, J. The defendant appeals from a judgment made final on a default against him, and contends that it is illegal because he was not properly cited to appear and answer the demand of plaintiff.

The sheriff's return reads as follows: "Served a copy of the within summons, together with a petition, on Paul Leon St. Julien, by leaving the same with J. G. St. Julien, a free white person above the age of

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fourteen years, residing with the defendant, the said Paul Leon St. Julien, he being absent at the time, between the hours of 12 and 3 P. M. on twenty-ninth January, 1866."

The service was illegal; it does not appear where it was made. The return does not state where the domicile or house inhabited by the defendant is situated. C. P. 201.

It does not state that the copies of citation and petition were left at the usual place of domicile or residence of the defendant. C. P. 189.

In service at domicile the sheriff's return must state *the absence of defendant from home, and that the person with whom the citation was left was living there*. "The law only dispenses with personal service when the defendant is absent from home." Kendrick v. Kendrick, 19 L. 36; 4 A. 363; 7 A. 268.

The defendant not having been legally cited, the default and judgment were erroneous.

It is therefore decreed that the judgment appealed from be avoided and annulled; and it is ordered that this cause be remanded to be proceeded in according to law, and that plaintiff pay all the costs.

No. 690.—STATE OF LOUISIANA ex rel. N. J. SANDLIN, District Attorney, v. J. D. WATKINS, Judge of the Eleventh Judicial District.

Act No. 166 of 1868 in providing a mode of legally ascertaining whether persons holding office under the authority of the State of Louisiana, are incompetent to exercise the duties thereof, by reason of the disabilities imposed on certain classes of persons by the Constitution of the United States, does not impose pains and penalties on any one, nor does this act assume authority which appertains exclusively to the Federal tribunals.

A suit brought under the intrusion act, No. 156 of 1868, against a party in office, is not to inflict punishment, nor to impose penalties or disabilities upon him, but simply to inquire into his right to hold and exercise the office.

Section 3 of the act of Congress of twenty-fifth of June, 1868, entitled an act to admit the States of North Carolina, South Carolina, Louisiana and other States to the Union, provides that no person prohibited from holding office under the United States by section three of the proposed amendment, known as Article Fourteenth, shall be deemed eligible to any office in either of said States.

The State Courts of Louisiana will enforce this law of Congress; and where it is ascertained by suit under the intrusion act, No. 156, of 1868, that a party is disqualified from holding an office under the provisions of this act, his disqualification will be judicially declared.

APPEAL from the Eleventh District Court, parish of Claiborne. Scott, Parish Judge, presiding. N. J. Sandlin, District Attorney, for the State, appellant. J. D. Watkins, in person, appellee.

TALIAFERRO, J. This is the second appeal which has been taken in this controversy, the first having been dismissed for want of jurisdiction of the Court before which the proceedings were had.

The case is now before us on appeal taken by the plaintiff from a judgment rendered by the Parish Judge of the proper jurisdiction, acting in the place of the District Judge, who is the defendant herein, and necessarily recused. The action is brought under the intrusion

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act (No. 156, acts of 1868,) and is based on the allegations that the defendant is unlawfully holding and claiming to exercise the duties of Judge of the Eleventh Judicial District of Louisiana, contrary to the provisions of the eligibility act, No. 39, of the acts of the State Legislature of 1863, and the third section of the Fourteenth Amendment to the Constitution of the United States. It is charged against him that prior to the late rebellion he held the office of District Attorney of the Seventeenth Judicial District of the State, and as such took an oath to support the Constitution of the United States, and thereafter engaged in rebellion against the United States and gave aid and comfort to the enemies thereof; and the prayer is for a judgment extruding the defendant from office, and for costs, etc.

The defendant filed an exception, to the effect that a State Court has no jurisdiction over any of the matters set up in the petition; that the allegations against him are, that he is liable to certain punishment, pains and penalties, disfranchisement and deprivation of rights for having committed certain alleged treasonable acts for which punishment is announced by the Fourteenth Amendment to the Constitution of the United States; that the State of Louisiana is wholly without interest in this suit; that the United States alone can maintain the suit; that all action by the State, the Legislature, the Governor or Courts, in regard to the matters herein, are null and void; that the Fourteenth Amendment is not self-enforcing; that by the fifth section thereof Congress has the exclusive power to enforce it, and that the Federal Courts have exclusive jurisdiction of all crimes, offenses and misdemeanors under the laws and Constitution of the United States as herein charged.

It does not clearly appear from the record that the exception was passed on by the lower Court, but as it has been argued before us, and as it involves the question of jurisdiction, we have given it due consideration.

We do not find that the law under which this action is brought is contrary to the Constitution. In enacting it the Legislature established a mode of legally ascertaining whether persons holding office under the authority of the State of Louisiana are incompetent to exercise the duties of those offices by reason of the disabilities imposed upon certain classes of people by the Constitution of the United States, or by act of Congress of June 25, 1863. This the State has obviously a great interest in doing and a clear right to do. The act numbered 156, of session of 1868, imposes pains or penalties upon no one. It assumes no authority which appertains solely to the Federal tribunals. The suit, therefore, against the defendant is not to inflict punishment or to impose penalties or disabilities upon him, but to inquire legally into

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his right to hold and exercise the office which he contends he is entitled to.

The exception is overruled.

The substance of the answer is embodied in the exception. In the answer the defendant sets up the unconstitutionality of act No. 39, of August 26, 1868, and that the fourteenth amendment to the Constitution of the United States does not apply to this case. This suit we understand to be, from the form of the petition, being brought in the name of the State, and concluding with the prayer that the defendant be cited to answer, essentially a suit brought under the act No. 153, of acts of 1863, before referred to. It is, then, unnecessary to inquire into the constitutionality of the act No. 39.

The inquiry in this case is, has the defendant, under the provisions of the fourteenth amendment to the Constitution of the United States and those of the act of Congress of twenty-fifth June, 1863, entitled an act to admit the States of North Carolina, South Carolina, Louisiana and other States to the Union, the legal right to discharge the duties of the office of District Judge of the Eleventh Judicial District of the State of Louisiana? It is clearly established that the defendant, before the late rebellion, held an office for the discharge of the duties of which he took an oath to support the Constitution of the United States, and that he afterwards engaged in the late rebellion against the United States. It is also established that the defendant was elected Judge of the Eleventh Judicial District of the State on the seventeenth and eighteenth days of April, 1868, obtained his certificate of election in the month of June following, and was commissioned in the month of July, 1868, having taken the oath required by the Constitution of the State on the thirteenth of the month last named.

What are the impediments in the way of the defendant's holding the office? He contends that the fourteenth article of the amendments to the Constitution does not affect him because it was not adopted until after he became entitled to his office; that it is prospective only in its effect; that it is not self-enforcing, and before it can have effect it requires legislation by Congress. These positions we are far from assenting to; but without considering them, there is a part of the supreme law of the land bearing upon the case before us which cannot have a retrospective effect upon it, for the reason that it was in force before the defendant was commissioned as Judge of the Eleventh District. We refer to the act of Congress before mentioned, passed on the twenty-fifth June, 1868. The observance of this law was expressly made a condition on which Louisiana was re-admitted to the Union. The third section of that act provides that "no person prohibited from holding office under the United States by section three of the proposed amendment, known as article fourteenth, shall be deemed eligible to any

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office in either of said States, unless relieved from disability as provided by said amendment, viz: by a vote of two-thirds of each branch of Congress." This law was in force from and after its passage; it is of paramount authority, and it is obligatory upon the Legislatures and the courts to carry it into effect. We think it applies to the present case, and that the defendant is disqualified thereby from holding and exercising the office of Judge of the Eleventh Judicial District of the State of Louisiana.

It is therefore ordered, adjudged and decreed, that the judgment of the lower Court be annulled, avoided and reversed. It is further ordered, that the defendant be and he is hereby declared incapacitated by law for holding the office of Judge of the Eleventh Judicial District of the State of Louisiana, and that he be restrained and inhibited from exercising the duties and receiving the emoluments of the same, and that he pay all costs of this suit.

Rehearing refused.

No. 678.—CARL WOLFF v. K. W. MCKINNEY.

An appeal from an interlocutory judgment will not be entertained where it is not manifest that such decree would work irreparable injury.

APPEAL from the District Court, parish of St. Landry. *Baily, J. Moore & Morgan* for plaintiff and appellee. *Dupree & Garland* and *King* for defendant and appellant.

HOWE, J. The plaintiff having caused certain cotton, on which he claimed a privilege, to be sequestered, the defendant, on the tenth November, 1866, made a motion to dissolve the writ. On the sixteenth of the same month he obtained permission to bond the property, and on the twenty-first the bond was given. On the twelfth February, 1867, the motion to dissolve was overruled, and from this interlocutory judgment the defendant has appealed.

We must decline to enter into the merits of this appeal. The cause, itself, has never been tried, and it may be that the plaintiff will never obtain a final judgment. The law does not favor the bringing up of cases by fragments, and therefore has provided no appeal from interlocutory decisions unless they work irreparable injury. That the order in this cause does not work such injury is well settled. *State v. Judge*, 2 R. 395; *Wilson v. Churchman*, 4 Ann. 343; *Lemoene v. Garcia*, 4 Ann. 366; *Hart v. Phillips*, 1 R. 223; *Powell v. Hopson*, 12 A. 615.

It is therefore ordered, that the appeal be dismissed at defendant's costs.

Marx Levy et al., Liquidators, v. V. Gremillion et al.

No. 687.—MARX LEVY et als., Liquidators, v. V. GREMILLION et als.

A third holder of a promissory note, given for the price of a slave, cannot recover thereon, although he acquired it in good faith, for a valid consideration, before maturity. *Groves v. Clark* re-affirmed, ante page, 567.

APPEAL from the Parish Court of Avoyelles. *Edwards*, Parish Judge. *Waddill & Barbin* for plaintiffs and appellants. *Cullom & Thorpe* for defendants and appellees.

LUDELING, C. J. On the twenty-ninth day of March, 1866, Marx Levy et al., liquidators of the firm of Isaac Levy & Co., brought suit against the defendants to recover the amount of a note executed by defendants.

It is admitted that the note was given for the price of a slave; and that it was transferred before maturity. It is further proved that the note was transferred for value.

There was judgment against the plaintiffs, and they have appealed.

We had occasion recently to examine the question presented in this case, whether a note, given for the price of a slave and transferred before maturity and for value, can be enforced by the Courts of this State, when in the hands of an innocent holder? And after mature consideration, we decided that such a contract could not be enforced now in this State. In *Wainright v. Bridges*, it was held that all contracts for the price of slaves were annulled by the sovereign power, and the Constitution of the State absolutely prohibits the courts from enforcing all such contracts. See the case of *Groves v. Clark and Carnal*, 21 An. 56; Art. 128, Constitution of 1868.

It is, therefore, ordered and adjudged that the judgment of the District Court be affirmed, and that the appellants pay the costs of this appeal.

No. 725.—MARI SYDONIA RICHARD v. J. J. BEAUCHAMP, Sheriff, et al.

The allegations in a petition for injunction against an order of seizure and sale show, that the consideration of the debt for which the mortgage was given was Confederate notes, and that petitioner is the surviving partner of her deceased husband, and, as such, is entitled to one thousand dollars out of his estate by preference. Held—that the petition disclosed an interest in preventing the payment of this illegal debt, and therefore disclosed a cause of action.

A bill of exceptions to the rejection of evidence by the judge must state the grounds on which it was rejected.

APPEAL from the District Court, parish of St. Landry. *Bailey, J.* *B. A. Martel & Hudspeth*, for plaintiff and appellant, *Henry L. Garland*, for defendants and appellees.

LUDELING, C. J. The plaintiff enjoined the sale of property belonging to the succession of her husband, which was about to be sold under an order of seizure and sale. Of the many reasons stated in the petition for injunction, it will be sufficient to notice only the following: The plaintiff alleges that she *has learned* that her husband is dead;

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that she is entitled to be paid one thousand dollars out of his succession by preference, by virtue of act No. 255 of the General Assembly, passed seventeenth March, 1852, and that the mortgage was executed to secure a note given for Confederate notes.

The defendants move to dissolve the injunction because the allegations in the petition disclose no cause of action, and because the oath is insufficient.

The plaintiff swears that the facts and allegations contained in the petition are true.

These allegations show that the note, secured by the mortgage attempted to be enforced, was given for the illicit currency issued by the Confederate States and that the plaintiff has an interest in preventing the collection thereof.

The motion to dissolve the injunction should have been overruled. Constitution of Louisiana, article 127, and Foster, and McAlister, executor, v. The Bank of New Orleans, 21 An.

A bill of exceptions was taken by the plaintiff to the ruling of the judge *a quo* rejecting certain evidence. The bill of exceptions does not inform us *what* was the objection urged by defendant—hence we cannot act upon it. Article 488 C. P., declares that in the bills of exceptions shall be concisely set forth the grounds of the exception so taken.

For the reasons given, it is ordered that the judgment of the lower court be avoided and reversed—that the motion to dissolve the injunction be overruled, and that the case be remanded to the District Court to be proceeded with according to law.

It is further ordered that the appellees pay the costs of this appeal.

NO. 693.—DARBY and TREMOULET, Syndics, v. EUPHEMIE FUSELIER, Widow, etc.

Darby & Tremoulet, commission merchants, in the city of New Orleans, made advances to A. Grevenberg to a large amount, predicated on a letter of credit written by Mrs. Widow Fuselier, his mother, requesting said firm to make advances to and accept the drafts of said Grevenberg to enable him to pay for a plantation. Grevenberg obtained the advances and afterwards shipped his sugar crops to said merchants, which far exceeded in value the amount of advances made to him, the proceeds of which he was allowed to draw out without reserving the amount of the advances. Grevenberg died, and his merchants failed to present and enforce their privileges against his estate. Held—that the failure on the part of said Darby & Tremoulet to enforce payment for their advances, while it was in their power, discharged the surety who was bound on the letter of credit. That under this state of facts, the party giving the letter of credit is discharged by their laches.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Train, J. B. F. Winchester and Tucker & Davis*, for plaintiffs and appellants. *DeBlanc & Perry*, for defendant and appellee.

TALIAFERRO, J. The plaintiffs, as syndics of their former firm of Darby & Tremoulet, bring this action to recover the sum of \$35,749 54, with interest.

Darby and Tremoulet, Syndics, v. Euphemie Fuseller, Widow, etc.

They predicate their claim upon a letter of credit directed to them by the defendant requesting them to make advances to her son, Charles A. Grevemberg, and accept drafts drawn upon them by him to enable him to pay the price of a plantation which he had purchased in the parish of St. Mary, from W. W. Jenkins. The plaintiffs allege that they made the required advances for the said Charles Grevemberg to an amount exceeding \$55,000. That this indebtedness was reduced by September, 1862, to the amount which they now sue for.

The answer of the defendant admits her signature to the letter of credit, but specially denies all the plaintiffs' allegations as to indebtedness or liability arising from the letter of credit they declare upon.

The defendant had judgment in her favor and the plaintiffs appeal.

The facts presented are, that in the year 1858 Charles A. Grevemberg, the son of the defendant, entered into an agreement with Jenkins, whose plantation, with a large number of slaves upon it, was under seizure at the suit of Stewart Wilkins Fisk, Testamentary Executor, v. W. W. Jenkins, and advertised for sale on the second of July, 1858, by which he was to become the purchaser at the price of \$115,000. In consideration of this purchase, Grevemberg was bound to transfer his plantation in the parish of St. Landry to Jenkins at the price of \$45,000, and to pay and discharge for him the amount due the seizing creditors—\$29,955 10. Besides this he assumed the payment of other debts of Jenkins—one to Jackson & Co. of \$17,075 39; one to the estate of Louet of \$666 66½; one to D. & U. Urquhart of \$14,333 72, and a payment to Jenkins of \$7,964 97½.

To insure the performance of this undertaking, Grevemberg, on the third of July, 1858, executed a mortgage by notarial act, in favor of Jenkins upon the land purchased from him and a number of slaves attached to the cultivation.

The stipulations of the parties seem all to have been carried out fully. It seems to be established also that the plaintiffs advanced money and accepted drafts to enable Grevemberg to fulfill his obligations to Jenkins, and for that purpose they paid for Grevemberg about \$55,000.

It is shown that the commercial partners, Darby & Tremoulet, were the factors of the defendant and her son, from June, 1853, to September, 1862. That the business of the mother and her son was carried on separately, and the defendant during that period was in a state of opulence, making large sugar crops and shipping them to the house of Darby & Tremoulet; that the defendant had annually large sums of money over and above the wants of herself and her plantation, without debts to encumber her, and that she was in the habit of annually distributing her surplus funds among her children, and for this annual distribution the son, Charles Grevemberg, came in for a large share. It is also shown that Grevemberg himself had a large income from his

Darby and Tremoulet, Syndics, v. Euphemie Fuselier, Widow, etc.

plantation and that he made large shipments of sugar to his factors. For these parties the house of Darby & Tremoulet held, during the years mentioned, funds to the amount of half a million. The solvency and credit of Mrs. Fuselier were unquestioned. She was able at any time during the period the plaintiffs were acting as her factors to discharge the debt for which she was bound for her son. The son also had means in the hands of Darby & Tremoulet during the period from July, 1858, to September, 1862, to have discharged the debt. These funds should have been applied to its payment, for of all the debts of 1858 and 1859 that for the advances to pay for the plantation which was mortgaged was the debt Grevemberg had the most interest in discharging. It bore interest. It was the oldest of the debts shown in the subsequent accounts rendered by the factors. A running account was kept between the parties, and the balance shown in September, 1862, against Grevemberg is not likely to be any balance of the price of the plantation from Jenkins, but a balance of all the accounts of Darby & Tremoulet against Grevemberg. There has certainly been laches on the part of the plaintiffs in not giving the defendant notice of the non-payment of her son's indebtedness, and preserved for her all rights of action under the mortgage, if they intended to hold her bound in the event Grevemberg failed to reimburse them their advances. Instead of doing this, we find that after the death of Grevemberg, in 1862, and the insolvency of his estate, the plaintiffs figure as ordinary creditors on the tableau of debts of his estate, having failed to become subrogated to the rights of the mortgagee, who was entitled to the first mortgage on a large tract of land embracing a valuable sugar plantation.

A prolongation of the term granted to the principal debtor without the consent of the surety will release the latter. C. C. article 3032.

The creditor can do no act whereby the rights or recourse of the surety against the debtor may be destroyed or impaired. If he make a novation or grant time to the principal the surety is as effectually discharged as if the claim had been satisfied. 3 Rob.; 10 Rob. 412.

There are other points of defense in this case not without weight, but which we deem it not important to examine at length, concurring in the opinion of the District Judge that the laches of the plaintiffs on this point alone are shown by their own evidence and preclude them from recovering.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

 John A. Taylor v. James C. Hill.

No. 682.—JOHN A. TAYLOR v. JAMES C. HILL.

A holder of mortgage paper having proceeded by executory process to enforce payment, cannot, while the suit is pending, proceed *via ordinaria* against the maker of the notes. In such a case the plea of *lis pendens* will be maintained as to the latter suit.

APPEAL from the Eighth Judicial District Court, parish of St. Landry. *Bailey, J. George R. King*, for plaintiff and appellant. *J. H. Overton*, for defendant and appellee.

TALIAFERRO, J. The plaintiff institutes this suit on two promissory notes of the defendant, each for the sum of \$2188 14, with interest at eight per cent. per annum on one of the notes from the seventeenth of April, 1859, and like rate of interest on the other from the seventeenth of April, 1860.

The defense is *lis pendens*. The exception was sustained in the court below and the suit dismissed. The plaintiff has appealed.

There is no error in the judgment. The notes were secured by mortgage. The plaintiff first proceeded *via executiva*. From the order rendered in that case the defendant took a devolutive appeal, the transcript of which forms the suit numbered six hundred and twenty of the docket of this court. It seems, by reason of a prior mortgage, the plaintiff realized but little on his own mortgage, and he seeks by this action a personal judgment against his debtor. The exception was properly sustained. See N. S. 493 and 665; 8 N. S. 96.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

 No. 686.—BERNARD DROGRE v. CHARLES MOREAU and WIFE.

In a suit to revive a judgment, it is incumbent on the party claiming to be owner, to establish the existence of the judgment and his ownership thereof. A copy certified from the mortgage office, without showing the loss of the original, is not sufficient to establish the existence of the original judgment.

APPEAL from the Seventh District Court, parish of Avoyelles. *Lewis, J. Irion & Overton*, for plaintiff and appellee. *Waddill & Barbin*, for defendant and appellant.

WYLY, J. The defendant, Clarice Goudeau, wife of Charles Moreau, has appealed from a judgment entered by default and made final against her husband and herself, reviving the judgment which they had confessed in June, 1858, in favor of Isaac Levy & Co.

It appears that plaintiff instituted within proper time the necessary proceedings to revive said judgment according to the provisions of the act of the thirtieth April, 1853, alleging that since the rendition of said judgment the said Isaac Levy & Co. transferred the same to Bellocq, Noblom & Co., who, in turn, transferred it to him, and that he is the owner thereof, and it has not been paid.

Copies of the petition for revival and of the citation were served on both the defendants according to law, and in due time the cause was

Bernard Drogre v. Charles Moreau and Wife.

put at issue by default, which was afterwards made final, reviving the judgment, the defendants having failed to make appearance.

The appellant urges that the petition for revival of the judgment is insufficient, because it does not mention the place of her domicile ; it does not allege that the judgment sought to be revived or the indebtedness upon which it was based inured to her benefit, and because it does not contain a prayer asking that she be authorized to stand in judgment.

These objections, if of any weight, should have been urged before the joinder of issue. We do not think, however, that averments of that kind are essential in a simple application to revive a judgment. The law simply provides the mode to interrupt the prescription of judgment. It does not require the same allegations and the production of the same evidence upon which the judgment was originally obtained.

The objection, however, that the default was made final without sufficient evidence of the existence of the judgment, and of the owner thereof, claimed by the plaintiff, is made with more effect.

We find in the record that the existence of the judgment was not established by a certified copy of the original, made by the clerk, but by a copy of the judgment as copied into the records of the mortgage office, that it is simply the copy of a copy certified by the recorder.

It should not have been received by the judge without the absence of the best evidence being properly accounted for.

We do not find in the record evidence proving that plaintiff is the transferee or owner of the judgment as alleged by him, but we cannot say he failed to prove his ownership to the satisfaction of the judge, who states that he did ; besides, it appears from the note of evidence that some proof of the transfers was offered, as we there find the following entry : "certified copies of transfers of judgment to be furnished."

The authorities in 20 A. 281, and 19 A. 146, relied on by the appellant to maintain her position that a judgment rendered against a married woman, without her being authorized to appear in court, is a nullity, do not apply to this case.

In those cases there was no default, a tacit joinder of issue by both the husband and the wife, but simply the unauthorized appearance and answer of the wife.

The court there very properly held that the unauthorized answer of the wife did not make a legal joinder of issue upon which a judgment may be based.

In this case there was no answer by either the husband or the wife, although both were legally cited.

There was a default entered, which by fiction of law was the appearante and joinder of issue by both the husband and the wife,

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the tacit appearance of both implying the authority of the former to the latter. 9 A. 197.

From the face of the record, however, we are not satisfied that the existence of the judgment sought to be revived, and plaintiff's ownership thereof were properly established. We think justice requires that this case should be remanded.

It is therefore ordered and adjudged that the judgment appealed from be avoided and annulled, and it is now ordered that this cause be remanded to the court *a qua* to be proceeded in according to law.

It is further ordered that plaintiff pay costs of the appeal.

No. 674.—A. P. NOBLOM v. E. C. MILBORNE.

Contracts entered into during the late war between parties, the one residing within the military line of the United States and the other within the Confederate lines of military occupation, are absolutely null, and no action will lie to enforce them.

APPEAL from the District Court, parish of St. Landry. *Bailey, J. B. A. Martel*, for plaintiff and appellant. *John E. King*, for defendant and appellee.

HOWELL, J. Three cases between these parties, involving the same subject matter, were cumulated by consent in the lower court, for the purpose of trying a peremptory exception filed in each, and a separate judgment was rendered in each, from which appeals have been taken by the plaintiff, and they are before us in one transcript.

The plaintiff, a resident of New Orleans, alleges that, on the sixteenth of October, 1863, he purchased from the defendant, residing in the parish of St. Landry, his cotton crop, consisting of eighty bales of cotton, then on the plantation of the latter in said parish, and asks for the delivery thereof and damages to the amount of five thousand dollars.

The exception is that the contract is an immoral one, being one between parties residing at the time within the different hostile military lines, and prohibited by the acts of Congress, the proclamations of the President and the laws of nations.

The exception was properly maintained.

All such trading was prohibited and the courts will not enforce any contracts arising therefrom, but will leave the parties where they have placed themselves. See *Marchand v. Coyle*, 13 A. 632; *Hennen v. Gilman*, 20 A. 241.

It is therefore ordered that the several judgments appealed from herein, to wit: in the cases numbered 9499, 9531 and 9536, on the docket of the District Court in the parish of St. Landry, be affirmed with costs.

Josephine F. Fanelie Boulligny, Widow, v. Pierre Gary et al., Administrator.

No. 654.—JOSEPHINE F. FANELIE BOULIGNY, Widow, v. PIERRE GARY et al., Administrator.

A peremptory exception that the petition discloses no ground of action, admits, for the purposes of the trial of the exception, that all the allegations in the petition are true, and no amount of evidence can have any influence in determining the question raised by the exception.

APPEAL from the District Court, Parish of St. Mary. *Gates, J. R. Perry*, for plaintiff and appellant, *Gary & Fournet and A. & F. Voorhies*, for defendant and appellee.

LUDELING, C. J. Désiré Beraud died in 1865, and the administrator of his succession having ascertained that the estate was insolvent, caused a meeting of the creditors to be convoked pursuant to articles 1160, 1161, 1162 and 1163 of the Civil Code. At that meeting the plaintiff appeared and swore that she was a privileged creditor of the estate for the sum of \$1200, constituted as her dower by marriage contract with the deceased. And the administrator having caused the property to be advertised for sale upon terms different from those she had indicated at the meeting, she has obtained an injunction to prohibit the sale, on the ground that as a privileged creditor, she has a right to have so much of the effects of the succession sold as may be necessary to satisfy her claim, on such terms as she chooses.

The defendants filed the peremptory exception, "that the petition does not disclose any ground of action, and that the allegations show that the rights of the plaintiff have not been liquidated or settled so as to enable her to vote in the deliberations of creditors."

The exception is in the nature of a demurrer, and admits all the allegations in the petition to be true.

It is difficult to discover wherein the allegations of the petition are defective. The material allegations of the petition are that the estate is insolvent; that she appeared at the meeting of the creditors and indicated, in the manner pointed out by law, upon what terms she desired the property sold; that she has renounced the community which existed between her and her husband; that "she is a privileged and mortgage creditor of said insolvent estate in the sum of twelve hundred dollars, due to her by her deceased husband as dowry, constituted per marriage contract," "for the restoration and payment of which she has a privilege," etc; and that she will be irreparably injured by the sale.

On the trial of the exception the defendant offered copies of the inventory and of the marriage contract. This was irregular. The exception judicially admits the truth of the allegations of the petition for the purpose of the trial of the exception, and no amount of evidence could CHANGE the allegations which are made in the petition, and which are admitted to be true. The evidence adduced should have no influence in determining the question raised by the exception. 4 N. S.

21	642
24	1089
24	1094

Josephine F. Fanelle Bouligny, Widow, v. Pierre Gary et al., Administrator.

Shelmerdine v. Duffy; 13 An. 179; Hiestand v. New Orleans; 14 An. 138. The exception should have been overruled.

It is therefore ordered, that the judgment of the District Court be avoided and reversed, and that the case be remanded to the District Court to be proceeded with according to law.

No. 703.—HEIRS OF BEDELL et al. v. CILESIE HAYES, Tutrix, etc. ADELARD CARLIN, Intervenor.

21 643
1104 52

An intervenor cannot be heard by exception, to the form of action by the plaintiffs.

A decree of the court homologating the proceedings of a family meeting which authorized the adjudication of the community property to the surviving parent on the estimate of the inventory, amounts to a sale of the property to the survivor, and not a judgment for money on which execution could issue.

A creditor intervening in a suit, by the heirs against their mother, to enforce payment of their interests in their father's estate which she has purchased, by opposing the validity of the claims of the heirs is not instituting an inquiry into the correctness of the judgment approving the adjudication.

The heirs of a deceased parent cannot recover from the survivor, who has purchased the community interest of the deceased, that portion of the price which is shown to be for slaves belonging to the estate of their deceased parent. Constitution, Art. 128; 19 An. 234.

APPEAL from the District Court, parish of St. Mary. *Gates, J. J. G. Oliver & Dumartrait*, and *De Blanc & Perry*, for intervenor and appellant, *D. Caffery*, for appellees.

Howe, J. Jotham H. Bedell died in the parish of St. Mary in the year 1859, leaving a large property in community with his wife, Mrs. Cilesie Hayes, and separate property amounting to \$10,000. The surviving wife was confirmed as natural tutrix of her minor children, and Edmund Rose appointed under tutor, on the thirtieth of January, 1860. An inventory was made and on the sixteenth day of February, 1860, the community property was adjudicated to the widow at the estimated value, \$75,978 33.

In 1863, Emily Bedell, one of the minors died, and her share was inherited, one-fourth by the widow, and three-fourths by the other children. In 1867, this action was instituted by the heirs who had become of age, and by Rose, under tutor of those who still remained minors, to obtain judgment against the defendant for the amounts due each respectively and a sale under their tacit and special mortgages.

Adelard Carlin intervened, claiming to be a creditor of the defendant for \$14,537 20, subject to a credit of \$8000, upon a note made by her on the first of March, 1862, and secured by special mortgage on her lands. He excepted to the form of the action by the heirs, and to the capacity of the under tutor to sue. The suit as to the under tutor was dismissed. The exception of the intervenor to the *form* of the action was properly overruled. As intervenor he had no right to raise this question.

Heirs of Bedell et al. v. Cileste Hayes, Tutrix, etc. Adelard Carlin, Intervenor.

The intervenor further opposed the claim of the plaintiffs upon the merits.

The defendant by answer admitted herself indebted to the heirs and filed an account thereof.

The minors Catherine Bedell and Marietta Bedell, who, with Elizabeth Bedell, had been represented as plaintiffs by Rose, having been emancipated, intervened and asked to become plaintiffs, and set up the same claim as the other plaintiffs.

There was judgment rejecting the demand of the intervenor Carlin, and in favor of the plaintiffs for the amounts set forth in the account filed by the defendant, and that their legal and special mortgage take effect from January 30, 1860. The intervenor Carlin appealed.

There remains three questions to be disposed of presented by the intervention of the appellant and by the evidence.

I. The intervenor objects that the claim of the minors against their natural tutrix for \$11,000, the separate property of their father, is not established, by sufficient proof. It was included in the account of the tutrix made in 1860, at a time not suspicious, when the defendant was in good circumstances, more than two years before the debt to Carlin was contracted. It was homologated by the court. Its correctness is not denied or put at issue by the petition of intervention of Carlin, and the account in which it figures as a prominent item was offered by the plaintiffs and received in evidence without objection. It would therefore seem that this portion of the claim of plaintiffs is sufficiently established.

II. It is contended by the appellant that, as appears by the record, the community property adjudicated to the defendant was in part composed of slaves, the estimated value of which he calculates at \$40,960, and that the account also shows an item in favor of the minors for the hire of a slave, \$465—and that these items should have been disallowed. The court *a quo* erred, we think in not reducing the claim of the minors by the amount of the price of the slaves held in common. The adjudication to the surviving parent was a sale. The estimate of the inventory was a price. A portion of the objects of the sale were persons. C. C. 338; Constitution, article 128; 19 Ann. 234.

The judge *a quo* says in his reasons for judgment :

“The slaves were adjudicated to the survivor of the community, upon the advice of a family meeting, whose proceedings were regularly homologated by judgment, and the judgment thus rendered cannot be inquired into collaterally.”

It is quite true that as a general rule judgments cannot be inquired into collaterally; but we do not perceive that, as to this branch of the case, the intervenor is making such inquiry. The family meeting advised an adjudication, the judgment approved the advice. From this resulted a sale; from this sale a debt; from this debt a mortgage.

Heirs of Bedel et al. v. Cilezie Hayes, Tutrix, etc. Adelaar Carlin, Intervenor.

There was no judgment against the defendant at that time for a sum of money, with a resulting judicial mortgage, or recognition of any other sort of mortgage. If there had been, this suit would have been unnecessary as to the plaintiffs, and such judgment as there was in 1860, homologating the proceedings of the family meeting, the appellant does not complain of. He merely asks us not to enforce the debt arising from the execution of the judgment so far as it was a contract for the sale of persons. To the extent, then, of the price of slaves the claim of the plaintiffs must be reduced.

The hire of the slave claimed to have belonged to the minors, stands upon a different basis. It appears that the tutrix from 1859 received for this hire \$465. She received it for the minors. Some one chose to pay her so much money for the minors. It is not her money. The minors, and no other persons, claim it. The tutrix must account for it even if she received it unduly. C. C. 2974.

III. It is contended by the appellant that no interest is due by the tutrix upon the amount of \$10,000 received by her October 8, 1859, and upon the minors' share of the community property adjudicated to her February 16, 1860. The reasons urged are the same as those presented in the case of *Fuselier v. Babineau*, 14 Ann. 764. It was there held that interest was due by the tutor upon money coming into his hands; and that the question raised was no longer an open one. See also the cases in 3 La. 194; 4 R. 300; 5 Ann. 565; 10 Ann. 289.

Upon the principle of *stare decisis*, we do not feel authorized to reopen the controversy on this point. And as regards the community property adjudicated to the defendant, the law seems to provide expressly for the interest, as well as the principal, of the debt created by the adjudication. C. C. 333, and act of March 17, 1826.

The account, however, on which the judgment is based, and to which, giving no specific amounts, it refers, shows that the interest is repeatedly compounded in cases where its annual amount, in excess of the expenses of the ward, is less than \$500. This we think erroneous. C. C. 341.

For the reasons given, it is ordered and adjudged that the judgment appealed from be reversed, and the cause remanded, that the account of the defendant as tutrix may be amended and stated in accordance with this decision, and to be further proceeded with according to law, costs of the appeal to be paid by the appellees.

No. 722.—ROBERT S. PERRY, Administrator, v. PARISH OF VERMILION.

Warrants for money drawn by the police jury on the parish are prescribed by the lapse of five years from the time they become due.

A PPEAL from the Seventh District Court, parish of Vermilion. *Porter, J. R. S. Perry*, for plaintiff and appellee, *Joseph H. Breauz*, for defendant and appellant.

Robert S. Perry, Administrator, v. Parish of Vermilion.

WYLY, J. Plaintiff bases his action on certain warrants of the police jury of the parish of Vermilion held by him, and the court gave him judgment for the amount claimed.

The defendant has appealed.

In bar of the action the defendant pleaded the prescription of five years, the warrants being then over five years past due. We think the judge *a quo* erred in not maintaining the plea of prescription. Plaintiff declared upon the unconditional obligation of the defendant; it was prescribed, presumed to be paid.

We see no reason why the parish of Vermilion, a juridical person, should not, as well as any other person, be permitted to plead the prescription of five years against its warrants. Prescription is a mode of extinguishing obligations, the same as payment and other modes; and we know of no law prohibiting the extinguishment of the obligation declared upon by prescription, or which prevents the parish from making the same defenses that any other person might make to a similar obligation.

The doctrine of novation resorted to, to evade the plea of prescription might apply as well to notes or drafts usually given by persons in evidence of debt. It does not apply to this case. The suit was not instituted upon the original debt, it was based on the warrants of the police jury. They evidence the debt, whatever the consideration may have been, and they cannot establish it because of prescription.

It is therefore ordered that the judgment of the court *a quo* be reversed and annulled, and it is now ordered that there be judgment for the defendant, plaintiff paying all costs.

NO. 622.—EMILY SITTIG, Tutrix, v. A. W. LITTELL, et als.

Where judgment has been rendered in the lower court against the maker and indorser of a promissory note, and the maker appeals, he must make the indorser a party, otherwise the appeal will be dismissed for want of proper parties.

APPEAL from the District Court, parish of St. Landry. *Bailey, J. T. H. & E. Lewis*, for plaintiff and appellee, *Duprie & Garland*, for defendants and appellants.

HOWELL, J. In this case judgment *in solido* was obtained against the two makers and the indorser of a promissory note, from which the two makers took this appeal by petition and asked that the plaintiff be cited. It is manifest that the indorser has an interest and should be a party to the appeal, and as this court will notice, of its own motion, the want of proper parties, the appeal must be dismissed. 12 R. 203; 4 A. 577; 11 A. 409; 12 A. 755, 774, 801; 3 A. 317; 19 A. 137.

It is therefore ordered that the appeal herein be dismissed with costs.

A. P. Noblom v. James T. Swords.

No. 684.—A. P. NOBLOM v. JAMES T. SWORDS.

A contract made between two parties, the one residing within the Federal lines of military occupation and the other within the so-called Confederate lines, during the late war, is prohibited by act of Congress, and is therefore null.

A PPEAL from the Eighth District Court, parish of St. Landry. *Bailey, J. B. A. Martel* for plaintiff and appellant. *James M. Porter and John E. King* for defendant and appellee.

WYLY, J. The contract upon which this action is based reads as follows:

“BIG CANE, PARISH OF ST. LANDRY, Oct. 11, '63.

“Mr. A. P. Noblom

J T S

“Bought of James T. Swords.

— “25 bales of cotton, at \$60..... \$1,500 00

N “That cotton now in seed and stored away in my gin house on my plantation, situated in Big Cane, 2 miles from my landing. I obligate to gin it as soon as baling and rope is furnished me by the purchaser, and to forward to my landing whenever called for, and in good order. The cotton will be marked as per margin.

“JAMES T. SWORDS.

“Witness:

J. A. CAPPEL,
D. A. CUNNEY.”

The defendant pleads in bar of this action that the contract was made in violation of a prohibitory law, and therefore void, the plaintiff then residing in New Orleans in the Federal lines, and the defendant in the parish of St. Landry then in the Confederate lines.

The District Court gave judgment for the defendant, and the plaintiff has appealed.

The evidence in the record fully establishes the fact, that at the time of the contract the plaintiff resided in the city of New Orleans inside of the Union lines, and the defendant resided in the parish of St. Landry within rebel lines.

Commercial transactions of this character were inhibited by an act of Congress for purposes of public policy, and the contract was without effect, producing no obligation whatever. *Marchaud v. Coyle*, 18 A. 632.

It is ordered that the judgment of the Court below be affirmed with costs.

No. 685.—ALEXANDER SELLERS v. EMILE SELLERS et al.

A possessor of property under an authentic act is not bound to establish the verity of the sale where it is attached by a creditor on the ground of simulation.

The burden of showing simulation falls on the party attaching, when the purchaser is in possession.

A PPEAL from the Eighth District Court, parish of Lafayette. *Bailey, J. M. E. Girard* for plaintiff and appellee. *William & E. Mouton* for defendant and appellant.

WYLY, J. Plaintiff seeks to recover from the defendant, Emile Sellers, the amount of a note made by him, and also to have a contract of sale by public act from Emile Sellers to his son, Camile Sellers, passed June 11, 1863, declared simulated and void.

He alleges that said act of sale is regular in form, and the property pretended to be conveyed consists of six hundred and fifty-four and eighty-nine hundredths "acres of a fine body of well timbered land in St. Landry with all the improvements thereon, a branding iron marked thus b, with its pretensions of horned cattle and horses branded therewith without reservation, and also two hundred and fifty head of sheep." * * * He alleges that the act was a simulation, that no consideration whatever passed between the parties, and that its object was to defraud a portion of the father's creditors and keep so much of the property in the hands of the son.

He further alleges, "That the property thus attempted to be screened by the father and only son from the just rights of the father's creditors, and which is the bulk of the father's property, is really worth more than twice the sum stipulated in the simulated act." The prayer is for judgment for the amount claimed, and that the pretended sale may be declared null.

Both the defendants joined in an answer, denying the allegations except the signature to the note, and averring that the sale was *bona fide* and for a "valid consideration."

The District Judge rendered judgment in favor of plaintiff for the amount claimed, and decreed the nullity of the sale from Emile Sellers to Camile Sellers, passed before William Bryant, Recorder, on the eleventh July, 1866.

The defendants have appealed.

This is purely an action *en declaration de simulation*, not a revocatory action proper, or *actio pauliana*. Its purpose is not to have an actual sale annulled for fraud, but to have the declaration that the act purporting to be a sale, was not a real sale, but only a shadow cast upon the title, a mere simulation.

The consideration of the sale, as appears by the notarial act, was \$1310, \$400 thereof cash, and for the balance, \$910, the purchaser assumed and obligated himself to pay the debts of his vendor, as follows: "a debt of \$400 to the succession of Joseph Le Blanc, a debt of \$250 to Bellom Bourdeau, a debt of \$200 to Sessin Le Blanc, and a debt of \$50 to the succession of Don Louis Olideu Broussard.

It does not appear in the evidence, nor was it alleged, that the vendor continued to hold possession of the property after the act of sale was passed. There is nothing in the record to show that any ownership over the property was afterwards exercised by the vendor. Indeed, it appears that both the vendor and vendee lived together on a different tract situated in the parish of Lafayette, which one of the witnesses, Broussard, believed was not owned by them. The defendants reside in the parish of Lafayette, as the plaintiff alleges; the tract of land sold was situated in the parish of St. Landry. Where there is no evidence

Alexander Sellers v. Emile Sellers et al.

to the contrary, we are bound to consider the vendee, by notarial act duly recorded, in possession of the property.

The sale is not presumed simulated, the purchaser being in possession, and the latter is not bound to establish the verity of the sale. C. C. 2456.

The plaintiff must make out his case. He has introduced a considerable amount of evidence of a negative character. The witnesses did not know that Camile Sellers had money or that he had enterprise.

The rebutting testimony shows that he was employed before the war and since in driving cattle for one of the witnesses, that he received wages therefor at the rate of two dollars per day in United States currency, or one dollar and fifty cents per day in specie; it is also in proof that he owned some cattle, and that he had sold some before he made the purchase.

We do not think the purchaser holding, by recorded title, property, not in the possession of the vendor, is bound to establish the verity of the sale. It is only where the vendor retains possession by precarious title or otherwise, that the law presumes simulation and puts the *onus probandi* of the reality of the sale on the purchaser. C. C. 2456.

There is no fraud proved against either the vendor or the vendee. The record shows the vendor owns other property; it does not show that he is embarrassed or in failing circumstances; it does not show that the vendee was even aware of the existence of plaintiff's claim.

On the whole we think the plaintiff has failed to make out his case; and that a notarial title, followed up by possession, should not be disregarded upon the mere suspicion of a creditor and upon negative testimony of the character adduced in this case.

It is therefore ordered, that the judgment appealed from be amended by rejecting the demand of plaintiff to have the sale from Emile Sellers to Camile Sellers declared simulated and null. As thus amended, it is ordered that the decree of the Court *a qua* be affirmed.

It is further ordered, that plaintiff pay the costs of appeal, and that Emile Sellers pay the costs of the Court below.

Rehearing refused.

No. 631.—EDWARD MOORE, Tutor, et al. v. B. B. SIMMS, Administrator.

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The affidavit of the District Judge, filed in the Supreme Court in 1867, stating that an appeal was granted in open court in 1862, is not sufficient to maintain the appeal in the absence of an order of appeal in the record.

APPEAL from Thirteenth District Court, parish of Avoyelles. *Cul-lom, J. H. S. L. Taylor*, for plaintiffs and appellees. *E. Philips* and *A. B. Irion*, for defendant and appellant.

WYLY, J. The appellees move to dismiss this appeal because there never was an order of appeal on motion entered on the minutes of the

Edward Moore, Tutor, et al. v. B. B. Simms, Administrator.

court and no appeal was granted on petition. We find no order of appeal in the record.

The judgment was signed on nineteenth December, 1862, but the transcript was only filed in this court on fourth September, 1867. On the same day the affidavit of the judge was filed, stating that the appeal was granted on motion in open court, and if not entered on the minutes of the court it was an omission of the clerk. If the clerk omitted to enter the motion and order of appeal on the minutes of the court, the appellant could have caused the entry to be made, *nunc pro tunc*, at a subsequent term of the court. 6 A. 707. It does not appear that this has ever been done, and the motion must therefore prevail.

It is ordered that this appeal be dismissed at appellant's costs.

No. 720.—FANNIE SATTERFIELD, Executrix, and Husband, v. E. P. DELAVALADE.

A party who received a note for collection and afterward returned it to the party from whom he received it, cannot be held responsible on proof that another party gave him notice while it was in his possession that he was the owner and would hold him responsible if he did not deliver the note.

APPEAL from the District Court, parish of Avoyelles. *Miller, J. Cullom & Thorpe*, for plaintiffs and appellees. *Henderson Taylor*, for defendant and appellant.

LUDELING, C. J. The plaintiffs sued the defendant for twenty-four hundred and thirty-five dollars and forty-three cents, with legal interest thereon from the fourth day of November, 1866, being the amount of a promissory note, inventoried as the property of the succession of S. M. Wells, and alleged to have been collected by the said Delavalade.

It appears from the record that the note was placed in the hands of Delavalade by Edward H. Satterfield for collection, and that Delavalade returned the note to said Satterfield, who surrendered it to A. T. Norwood, the executor of one of the makers of the note, in consideration of the sum of fifteen hundred dollars paid to the said Satterfield. It is true, that it is proved that a letter was written to Delavalade informing him that the note was the property of the succession of Wells, and that he would be held responsible for its amount unless he returned it to the executrix; but we are not prepared to admit that this fact made it obligatory on him to deliver the note to any one but Satterfield, from whom he had received it for collection.

The evidence satisfies us that Satterfield was not acting as the agent of Delavalade when he received the money from Norwood; and that Delavalade is not responsible to the plaintiffs for the amount claimed.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed, and that the plaintiffs' demand be rejected with costs of both courts.

Louis Leon v. Hermina Bouillet et als.

No. 718.—LOUIS LEON v. HERMINA BOUILLET et als.

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Citation served on a party whose native language is French, when the petition is only written in English, will interrupt prescription.

The exception that the petition is only written in the English language, when the mother tongue of the defendant is French, must be pleaded in *limine litis*.

The rule laid down in article 2269 of the Civil Code, that the husband cannot be a witness for or against his wife, etc., is without exception, and is applicable to all cases in which either or them are directly concerned, without reference to the time that such relation commenced.

A sole heir, having accepted the succession of her mother purely and simply, has the right to take possession of the property, and her husband, by administering it with her permission, does not become personally responsible for the debts of the succession.

APPEAL from the District Court, parish of St. Mary. *Gates, J. Oliver & Dumartel*, for plaintiff and appellee. *Simon & Voorhies*, for defendants and appellants.

LUDELING, C. J. This action is based on the following obligation :
\$2000 PAROISSE SAINTE MARIE, Avril 2, 1861.

“Nous promettors solidairement de payer à Monsieur Louis Leon ou à son ordre la somme de deux mille piastre avec l'interet de huit pour cent l'an depuis cette date jusqu'à parfait paiement pour valeur reçue.

“VVE. G. BOUILLET,

“Pr. B. MARTEL,

“THE. ARMELIN.”

The plaintiff alleges that Hermina Bouillet, wife of B. Martel, is the sole heir at law of her mother, G. Bouillet, and that she and her husband have taken possession of the property of the succession of G. Bouillet. He sues Hermina Bouillet, her husband, B. Martel, and Theodore Armelin, *in solido*, for the amount of the obligation above described.

The defendants filed an exception to the proceedings on the grounds that their maternal language was French, and that copies of the petition and citation in French should have been served on them. The judge *a quo* sustained the exception as to B. Martel and Theodore Armelin, but overruled it as to Hermina Bouillet. It was admitted that the mother tongue of all the defendants was French. The exception should have been sustained as to all the defendants. But the record shows that copies of the petition and citation in French were served on the defendants before further proceedings in the case were had.

The plea of prescription has been filed in this court; and it is contended that the citation in English, served on the defendants on the fifth day of October, 1865, did not interrupt prescription.

Article 3484 of the Civil Code declares that prescription is interrupted “when the possessor *has been cited* to appear before a court of justice, on account either of the property or the possession;” and article 3516 of the Code provides that “the prescription releasing debts is interrupted by all such causes as interrupt the prescription by which property is acquired.” See also articles 3517, 3518. Were the defend-

ants cited on the fifth of October, 1865? In *Thomas v. Baille* this court said: "The article 172 of the Code of Practice enacts 'that the petition, when either party speaks the French language as a mother tongue, must be drawn in the French and English languages.'" The same expression, "*must be*," is applied to all the required forms and particulars of a petition, such as the names, surnames and places of residence of the parties. But the Code does not pronounce the *absolute nullity* of a petition defective in these particulars. The nullity is therefore only relative; and the defendant has undoubtedly a right to require the petition and citation to be in both languages, on showing that his native language is French; *but it does not follow that the suit must be dismissed.* 7 La. p. 415. The citations and returns thereon, in the case at bar, being regular on their face, would have authorized judgments by default to be taken and made final, if the exception had not been urged in *limine litis*. We must conclude therefore that the defendants "had been cited to appear before a court of justice," and that prescription was thus interrupted. *Baker v. Thomas et al.* 4 La. 418; 4 R. 258; 12 La. 539; *White v. McQuillan*, and *Flower et al. v. O'Connor*, 17 La. 218.

On the trial of the cause, interrogatories on facts and articles were propounded to B. Martel to prove that he was authorized by widow G. Bouillet to sign the obligation sued on for her. Hermine Bouillet objected to the interrogatories and the answers, on the ground that said B. Martel is her husband, and he is prohibited by law from testifying for or against his wife. The objection was not sustained, and she retained a bill of exceptions to the ruling of the judge *a quo*.

Article 2260 Civil Code is peremptory. "The husband cannot be a witness either for or against his wife," etc. "It makes no difference at what time the relation of husband and wife commenced, the principle being applied in its full extent *whenever the interests* of either of them are directly concerned." *Greenleaf's Evidence*, § —.

"This rule is believed to be without exception," 11 An. 628. The evidence as to her should have been excluded. There is no legal evidence in the record to show that B. Martel was authorized to sign the name of G. Bouillet, consequently no debt is established against the succession of G. Bouillet. The judicial admissions and the evidence in the record show that Hermine Bouillet, wife of B. Martel, is the sole heir of G. Bouillet, deceased, and that, by her acts, she has accepted the succession of her mother purely and simply. She had a right to take possession of the succession property, and to permit her husband to administer it, and the husband did not, by administering the property, render himself responsible for the debts of the succession.

It is therefore ordered, adjudged and decreed that the judgment of the District Court against the appellants be avoided and reversed; and it is ordered that there be judgment of nonsuit on the demand against

Louis Leon v. Hermina Bouillet et als.

Hermina Bouillet, wife of B. Martel, and that there be judgment in favor of the defendant, B. Martel, on the demand against him, and that the appellee pay the costs of both courts.

Rehearing refused.

No. 695.—L. F. GENERES et als. v. EDWARD SIMON

A party holding a mortgage entitling him to executory process to enforce it, may proceed *via ordinaria* against the mortgagee, either in the parish of his domicile and residence, or in the parish where the mortgaged property is situated. C. P. 163.

All petitions addressed to courts are required to be written in the English language, but where a portion of a petition, not essential, and without which the cause of action would still remain, is written in the French language, the petition will not be dismissed because it is not entirely written in the English language.

APPEAL from the District Court, parish of St. Mary. *Gates, J. McMillan & Mossy*, for plaintiffs and appellees. *DeBlanc & Perry, A. L. Tucker, Gary & Fournet*, for defendant and appellant.

HOWELL, J. The plaintiffs, holders of several promissory notes, made by the defendant, a resident of the parish of St. Martin, and secured by an hypothecary act importing a confession of judgment, instituted this action by the *via ordinaria* in the parish of St. Mary, where the mortgaged property is situated, and asked that the defendant be cited and condemned to pay the amount of their respective claims, and that their mortgage be recognized and enforced against the property described.

Two questions are presented for our consideration by defendant's exceptions:

First—That the action is exclusively a personal action, and as such ought to have been brought in the parish of St. Martin, at the defendant's domicile.

The general rule in civil matters is, that one must be sued in the parish of his domicile, and shall not be permitted to select any other domicile or residence for the purpose of being sued, but this rule is subject to those exceptions expressly provided for by law. C. P. 162. The next article (163), provides expressly for actions like this, in which the hypothecary rights are sought to be enforced. It says: "In actions of revindication of real property, or where proceedings are instituted, in order to obtain the seizure and the sale of real property, in virtue of an act of hypothecation, importing confession of judgment, the defendant may be cited, whether in the first instance, or in appeal, either within the jurisdiction where the property revindicated or hypothecated is situated, though he has his domicile or residence out of that jurisdiction, or in that where the defendant has his domicile, as the plaintiff chooses."

The application of this article to suits of this character has been frequently recognized. See 2 N. S. 374; 4 L. 240; 3 A. 637; 15 A. 346.

Second—That in disregard of the provisions of our constitution a considerable portion of plaintiffs' original petition is written in the French language.

Article 103 of the constitution of 1864, relied on by defendant, provides that "the laws, public records and the judicial and legislative written proceedings of the State shall be promulgated, preserved and conducted in the language in which the constitution of the United States is written." The portion of plaintiff's petition in French is the description of the property, as contained in the act of mortgage, and the question is, does this conflict with the above article?

The word proceeding, in its general acceptation, means the *form* in which actions are to be brought and defended, the *manner* of intervening in suits, the *mode* of deciding them, of opposing judgments and of executing them. The *forms* are different in ordinary, executory and summary proceedings. C. P. 146. The form in the ordinary proceeding is by petition and citation.

"A petition is a written document, which the plaintiff addresses to a competent judge setting forth the cause of the action which he intends to bring against the defendant, and praying to be permitted to cite that defendant before him, that he may be ordered to do or to give a certain thing." C. P. 171.

The petition, setting forth the cause of action, must be in the English language; but if a plaintiff chooses to insert in it any part of the evidence of his demand, the petition will not be defective because that part is in the French language. If omitted, the petition would still contain the object of the demand and the cause of the action—the written *proceedings* in the case would be in the English language. If the petition in all its essential parts, the citation and the other material portions of the proceedings were in French only, and not in English, the objection of defendant would apply. But if in English and also in French, the constitutional provision invoked would be complied with. We cannot see that the proceedings in this case have not been conducted in the English language. The exceptions were properly overruled.

It is therefore ordered that the judgment appealed from be affirmed with costs.

James G. Hayes v. James M. Thompson.

No. 707.—JAMES G. HAYES v. JAMES M. THOMPSON.

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Proceedings against a party alleged to have usurped or intruded into an office, must be brought by the District Attorney, or District Attorney *pro tem.* of the parish in which the case arises, in the name of the State. Acts of 1868, No. 160, page 200, § 2.

APPEAL from the Eighth District Court, parish of St. Landry. *Porter, J. John H. Overton, Henry L. Garland, Moore & Morgan, Bailey & Estilette, and B. A. Martel* for plaintiff and appellant. *John E. King and George R. King* for defendant and appellee. *George W. Hudspeth*, District Attorney. *Thomas H. Lewis*, District Attorney *pro tem.*

WYLY, J. Plaintiff alleges that at the April election of 1863, he was duly elected sheriff of the parish of St. Landry; that subsequently, to wit: on twenty-ninth July, 1868, he entered on the duties of his office after being duly commissioned, and after giving bond and being qualified according to law. He alleges that since then, to wit: on twelfth July, 1869, the defendant, James M. Thompson, pretending that he has been appointed and commissioned by the Governor, as sheriff of said parish, has illegally entered into and usurped the office of sheriff of the parish of St. Landry, and unlawfully exercises the duties thereof; that the petitioner has given information to George W. Hudspeth, District Attorney, and to Thomas H. Lewis, District Attorney *pro tem.*, of the said intrusion and usurpation, and has requested them to institute suit against said Thompson under act No. 156, passed in 1863, but that they have refused to do so. He prays that said Hudspeth and said Lewis, in their official capacities, “be ordered to institute and carry on, by joining your petitioner in this suit against said Thompson, the proceedings provided for by act No. 156 of the acts of the Legislature of 1863.”

He further prays that judgment be rendered in his favor recognizing him as sheriff of St. Landry, and decreeing the said Thompson to be an usurper and intruder; and that he have judgment against him for \$1000.

This was evidently intended as a proceeding under act No. 156, known as the “intrusion act.” Its purpose was to give the plaintiff possession of the sheriff’s office, and to have the incumbent, Thompson, ejected as an intruder and usurper.

On referring to the act in question, we find that actions of this character can only be brought in the name of the State by the District Attorney, or the District Attorney *pro tempore*, and in the parish of Orleans by the Attorney General.

The second section of said act makes it the duty of the District Attorney, or the District Attorney *pro tempore*, of the parish where the case arises, to bring suit against the offending party when so required to do.

The fourth section thereof provides that when the action is brought on the relation or information of any person interested, the name of such person shall be joined with the State as plaintiff.

James G. Hayes v. James M. Thompson.

The State feeling an interest in her officers and desiring that none of her offices shall be filled by usurpers and intruders, has enacted this law, which is very plain, requiring proceedings of this character to be brought in the name of the State, but permitting a person interested to "be joined with the State as plaintiff."

Although no objection has been made by the defendant to the form of the action, we cannot permit the plaintiff to stand in judgment in an action which the law declares shall be brought only in the name of the State. It was made the duty of the District Attorney and District Attorney *pro tempore* to institute the action when so required; if they failed or refused to do so, as it appears they did, the plaintiff could have applied to the District Court for a writ of *mandamus* to compel them to discharge their duty.

In the case of *Wickliffe v. Delassizo*, 21 A. —, we held that a proceeding under the "intrusion act," (act No. 156 of the session of 1863), could only be brought in the name of the State. We still adhere to that view of the law.

It is therefore ordered, that the judgment appealed from be avoided and annulled; and it is now ordered that this suit be dismissed at plaintiff's costs in both Courts.

Rehearing refused.

No. 633.—RICHARD G. EASTIN v. EDGAR DUCREST.

Payment of a promissory note cannot be enforced when the consideration is shown to be the procuring, by the holder, a detail for the maker to enable him to keep out of active military service in the rebellion.

A PPEAL from the Third Judicial District Court, parish of St. Martin. *Gates, J. Gary & Fournet* for plaintiff and appellee. *De Blanc & Perry* for defendant and appellant.

TALIAFERRO, J. The plaintiff sues on three several promissory notes, amounting in the aggregate to \$963 principal, besides interest claimed from the maturity of each note. The judgment of the lower Court, predicated upon the verdict of a jury, was in favor of the plaintiff, and the defendant has appealed.

The defendant, it appears, in order to keep out of active military service of the insurgent authority, contracted with the plaintiff to procure him a "detail." We understand by a detail of this sort an obligation upon the party detailed to perform service in the interest of the rebellion in some other department than that of bearing arms. Contracts of this character we regard as illegal and null, and this Court will not extend its aid for their enforcement.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed. It is further ordered, that this suit be dismissed at plaintiff's costs.

John French v. William A. Riggs, Administrator.

No. 715.—JOHN FRENCH v. WILLIAM A. RIGGS, Administrator.

An open account for moneys paid on a judgment, for materials, labor and carpenter work done, and improvements in repairs and improvements on the premises, is prescribed by three years.

Charges for board, lodging, and support of another are prescribed by one year.

APPEAL from the District Court, parish of Iberia. *Train, J. Simon & Voorhies* for plaintiff and appellant. *Joseph A. Breauz* for defendant and appellee.

HOWELL, J. This is an action against the representative of the succession of plaintiff's mother, upon an account running from the first of September, 1856, to the twenty-second of June, 1867, for the support of the mother, at a fixed price per month; for the amount of a judgment paid by him, in favor of A. Voorhies, for materials, labor and carpenter's work done and furnished in repairs and improvements on the premises of the deceased, in the years 1858, 1859, 1861, 1862, 1865 and 1866; for taxes on her property from 1856 to 1867 paid by him on her account, and for funeral expenses.

The defense in the lower Court was the prescription of three years, which was sustained, and the plaintiff has appealed. In this Court the defendant has filed the prescription of one year also. Citation, in the Court below, was served on thirty-first day of May, 1869.

In the particular manner in which plaintiff has set out his demand, we must consider it based on an "open account" and subject to the prescriptions pleaded, except the item for funeral expenses (\$25), which were necessarily incurred and paid after the twenty-second of June, 1867, and which being proven by the evidence admitted in the Court below, must be allowed. The other items of the account, within the three years, being for the board, lodging and support of plaintiff's mother, are prescribed by one year.

It is therefore ordered that the judgment appealed from be reversed; and proceeding to render such judgment as should have been given by the Court *a qua*: It is ordered that plaintiff recover of William A. Riggs, administrator of the succession of Mary Stine, deceased, the sum of twenty-five dollars, with legal interest from judicial demand, to be paid in due course of administration; and it is further ordered, that there be judgment in favor of the defendant on all the balance of plaintiff's account sued on in this action. Costs in both Courts to be paid by defendant, the administrator.

Valsain A. Fournet v. Rodolphe Beer.

No. 713.—VALSAIN A. FOURNET v. RODOLPHE BEER.

Where the evidence shows that a lot of sugar has been sold, and a portion of the price agreed upon has been paid in Confederate notes, no action will lie to enforce payment of the balance of the alleged price. Constitution, Art. 127.

A PPEAL from the Third Judicial District Court, parish of St. Martin. *Train, J. Gary & Fournet*, for plaintiff and appellee, *Simon & Voorhies*, for defendant and appellant.

TALIAFERRO, J. The plaintiff alleges that in August, 1863, he sold to the defendant seventeen thousand nine hundred and forty-seven pounds of sugar, at sixty-five cents per pound, amounting to \$11,665 55. That he received from the defendant on account \$8000, and that the defendant owes him the balance, \$3665 55, for which he brings this suit and prays judgment. The suit was commenced by attachment, the defendant being deemed an absentee. He appeared by his attorney who moved to set aside the attachment; failing in which, he filed an answer to the merits. He avers that if he owes the plaintiff anything it can only be in the Treasury notes of the so-called Confederate States, or the equivalent value thereof in January, 1863, in legal currency, that plaintiff's sugar was sold for Confederate Treasury notes, in which notes plaintiff received in part payment for his sugar eight thousand dollars. Defendant prays that the plaintiff's claim be rejected in whole or in part at his costs.

There was judgment for the plaintiff for the amount claimed with lien on the property attached.

The defendant has appealed.

It is in proof that at the time the sugar was sold the article was selling at Niblett's Bluff where the plaintiff's sugar was sold at twelve cents per pound in specie, and from sixty to sixty-five cents per pound in Confederate money. It exceeds all power of belief that a merchant and business man, as it appears the defendant was at the time of the purchase of the sugar, would obligate himself to pay sixty-five cents per pound in gold or silver, or in United States currency for sugar when he could purchase the article for twelve cents per pound in silver. The plaintiff introduced himself as a witness and on cross examination said: "Confederate money was not the consideration for the sale of the sugar which I made to Mr. Rodolphe Beer. The sum of \$8000 credited in petition was paid in Confederate money. The price of sugar at the time was sixty-five cents per pound more or less in Confederate money."

If the contract had been on a specie or legal currency basis, and the parties so understood it, it is not easy to see why the plaintiff received in payment of more than two-thirds of the price, Confederate money. The plaintiff's own evidence is contradictory. He admits that he received the payment of eight thousand dollars in Confederate money and this raises a strong presumption that the whole price was to be

Valsain A. Fournet v. Rodolphe Beer.

paid in the same currency. The whole testimony, taken together, points unerringly to the transaction as one in which the parties contracted the one to give and the other to receive Confederate money in discharge of the obligation. The plaintiff by receiving the \$8000 in Confederate money, and giving his receipt at the time to be credited on the net proceeds of the lot of sugar, gave credit to the illegal currency.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed.

It is further ordered that this suit be dismissed, the plaintiff paying costs in both courts

Rehearing refused.

No. 701.—SUCCESSION OF CORNELIUS VOORHIES. Opposition to Tableau of Administrator.

A written agreement to pay a certain amount of money to another, styled a bond, falls under the class or denomination of promissory notes, and is prescribed by the lapse of five years from maturity. *Bank of Louisiana v. Williams*, ante page 121.

A payment made by a security will not interrupt prescription as to the principal debtor.

A PPEAL from the Parish Court, parish of St. Martin. *Fontelieu*, Parish Judge. *Simon & Voorhies*, for appellee, *DeBlanc & Perry*, for appellant.

HOWELL, J. On the twenty-second of December, 1863, the administrator of the succession of Cornelius Voorhies, deceased, alleging that he had no funds to be distributed, filed what is termed "a tableau of classification of said succession," setting forth the amount of the inventory and the amounts of the mortgage, privilege and ordinary debts, which he prayed might be published and homologated.

Mrs. Cidalise Mouton, surviving widow, opposed the homologation on the grounds that no administration was necessary, as the property was all community property and had already been adjudicated to her at the price of estimation; that if the said adjudication should be invalid, she should be placed on the tableau as a creditor for \$30,000, paraphernal funds secured by mortgage; that should said above rights be null and void, then she should be placed on the tableau for \$2000, instead of \$1000 as a homestead; and she opposes all the claims on the tableau except the privileged claims, as being prescribed by one, two, three, four, five and ten years, and especially declares that the mortgage claim of the Bank of Louisiana is prescribed by five years, and the mortgage itself is extinguished for want of reinscription.

The Bank of Louisiana also filed an opposition, alleging that the active mass of the estate should be increased by certain amounts specified; that the surviving widow, having used said amounts to pay debts inferior in rank to certain claims set up as privileged, said claims should be disallowed, and that other claims classed as privileged,

except the clerk's bill, and all other debts, except that due the bank itself, are not due, and if due, are not payable out of the price of the property mortgaged to the bank.

Subsequently the said bank filed an answer to the opposition of the surviving widow, asking that the adjudication to her of the community property on the twenty-second of October, 1860, be declared null and void, because, at the time, the succession was and still is largely in debt, and specially contesting all other matters set up in said opposition.

After hearing the parties, the Parish Judge rendered judgment sustaining the opposition of Mrs. Mouton, widow, etc., to the effect that the claim of the Bank of Louisiana be rejected from the tableau with costs of its opposition and condemning the estate to pay costs of the widow's opposition.

From this judgment the bank has appealed.

The first question presented for solution is the prescription of the bank's claim which was sustained by the court *a qua*.

The claim is based on a written instrument signed by Cornelius Voorhies and wife, and denominated a bond, and is exactly similar to the one sued on in the case of the same bank against D. P. Williams and wife (21 A. 121), and declared subject to the prescription of five years.

It is contended that the prescription of five years does not apply; that if it does, it was suspended by the war and interrupted by payments and an extension of payment.

The two first points are settled adversely to the pretensions of the bank and we see no reason for unsettling them.

The "bond" or note is for \$25,000, and was due on the fourth of June, 1859, and secured by act of mortgage, in which B. O. Vignaud intervened and bound himself and his firm of Menard & Vignaud to pay said obligation in case of default on the part of the mortgagers, and waived discussion. At the above date a payment of \$5000 on the principal, and of the interest up to fourth June, 1860, was made. On the first July following, to wit, 1859, Cornelius Voorhies died. Joseph Menard, a witness for the bank, testifies that the firm of Menard & Vignaud were the commercial agents and commission merchants of Judge Cornelius Voorhies, and after his death continued as such for widow Cornelius Voorhies; that on the fourth June, 1860, the interest to fourth June, 1861, was paid by Menard & Vignaud, and that in 1861, the bank extended the payment of interest on the bond to June, 1862. To the last direct interrogatory propounded to him, he says: "The last payment made by the firm on the bond referred to, was on the fourth of June, 1860. Since then I have no other recollection of any other payment having been made on said bond for account of Mrs. Voorhies." There is no other evidence as to the alleged extension.

Succession of Cornelius Voorhies. Opposition to Tableau of Administrator.

Mrs. Voorhies, as a witness, denies that Menard & Vignaud were authorized by her to make any payment for her to the Bank of Louisiana, or that she had any dealings with them as her factors after they sold the crop of 1859. The firm therefore was without authority to make the payment on the fourth June, 1860, or procure the alleged extension to June, 1862, for the debtors. The payment on the fourth of June, 1860, of the interest to fourth June, 1861, would not, if authorized, affect the plea of prescription, as more than five years intervened between that date and the acknowledgment of the administrator on the twenty-sixth of March, 1867. The bank however contends that Menard & Vignaud, being bound with the debtors, had an interest in effecting the extension of the payment of interest to the fourth of June, 1862, and that it being an acknowledgment of the debt due at that date, interrupted prescription as to the principal debtors.

It is only the acknowledgment of one of the debtors *in solido*, that interrupts prescription as to the others. C. C. 3517. Solidarity is not presumed, and as Menard & Vignaud did not expressly bind themselves *in solido*, with the mortgagers in the act of mortgage, they are simply the security of the latter, and their acknowledgment does not have the effect claimed for it. Article 3518 C. C. says, that the acknowledgment of the principal debtor interrupts prescription on the part of the surety; but the converse is not declared, and as there are no other modes of interrupting prescription than those established by the Code, we cannot apply the interruption of prescription in behalf of the security. The judge *a quo* did not err in sustaining the plea, and consequently the bank, the only appellant, is without interest to inquire into any other questions involved in the oppositions, and no one else complains, who can be heard.

Judgment affirmed at costs of appellant.

No. 723.—SUCCESSION OF HORTENSE PATIN.

In 1831, before emancipation, a number of slaves was sold at probate sale and purchased by the heirs. In 1867, after emancipation, the administrator filed his account debiting each one of the heirs with the amount of his purchase for slaves, which had not been paid into the succession, against which he opposed the amount of their respective inheritances, crediting or charging them with the difference, as the case might be. The heirs opposed the homologation of the account. Held—that under the settled jurisprudence of the State, the obligations contracted by the heirs in 1831, on account of their purchase of slaves, being null and void, could not be an element in either confusion or compensation; nor could that portion of the proceeds, for the sale of slaves, form a part of the assets of the estate, and that the administrator must account to the heirs for their portions without taking into account the sale of slaves as assets, and without charging the heirs with the amount of their purchase for slaves.

A PPEAL from the Parish Court, parish of Lafayette. *Moss*, Parish Judge. *William Mouton*, for appellant. *M. E. Girard*, for appellee.

Howe, J. Hortense Patin died in 1861, and on the twenty-eighth December, of that year, a sale of the effects of her succession was made. At this sale certain slaves were purchased by the heirs—one by Marcel Begneaud, for \$2040; one by Alice Begneaud for \$2430, and two by Emma Begneaud, widow of J. M. Dugas, for \$3660.

In February, 1867, Onezime Mouton, the administrator, presented an account and tableau, with prayer for advertisement, citation and homologation. The heirs above named filed their oppositions alleging that they were illegally charged with the amount of their purchases of slaves, the effect of which was to bring them in debt to the succession, after receiving credit for their inherited shares. The account was at first homologated so far as not opposed, and after trial of the oppositions the court *a qua* gave judgment that the oppositions so far as the inheritance of each was concerned be rejected, that amount being decreed to be "settled by confusion" to the extent of their purchases. The oppositions were maintained for the balance due the succession for the purchase price of slaves.

The opponents have appealed.

We are constrained to think that the judgment was erroneous. Under the jurisprudence of the State, as well settled, the obligations contracted by the heirs by their purchase of December, 1861, being null and void, cannot be an element in either confusion or compensation. To recognize them as such would be, practically, to enforce them. 19 Ann. 234; Constitution, article 128; C. C. 2205, 2214.

It is therefore ordered that the judgment appealed from be avoided and reversed; that the oppositions of the appellants be maintained; that the items of \$2040 charged against Marcel Begneaud, of \$2430 charged against Alice Begneaud, and of \$3660 charged against Emma Begneaud, widow of J. M. Dugas, be stricken out both from the list of debts due by them respectively and from the list of assets with which the administrator is debited, and that the cause be remanded in order that the account may be amended and homologated according to law. Costs of the appeal to be paid by the succession.

NO. 734.—ADOLPHE HARTMAN v. H. C. RENTROPE, Administratrix, et al.

The Parish Court is without jurisdiction *ratione materiae* in a suit where the amount involved is above five hundred dollars. *Swan v. Gayle*, ante page 478.

The nullity of a judgment resulting from want of jurisdiction *ratione materiae* may be urged at any time.

APPEAL from the Parish Court, parish of St. Mary. *Handy*, Parish Judge. *A. L. Tucker*, for plaintiff and appellee. *J. G. Oliver & Dumartrait* and *DeBlanc & Perry*, for defendants and appellants.

WYLY, J. The defendants, the legal representatives of the successions of Valsin H. Rentrope, deceased, and Henry Knight, deceased,

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have appealed from a judgment rendered against them by the Parish Court of the parish of St. Mary for \$1333 33, based upon the promissory note made by said Rentropé and Knight on fifteenth January, 1859. The first objection to the judgment urged by the appellants is that the Parish Court was without jurisdiction *ratione materiæ*, the amount involved being over five hundred dollars.

It appears that the suit was brought in the District Court before the organization of the Parish Court, but that it was tried in the Parish Court, and the appeal has been taken from that court.

In the cases of *Swan v. Gayle*, and *Calderwood v. Calderwood*, decided at the Monroe term, this court held that the Parish Court is without jurisdiction to try a suit where the amount in dispute exceeds five hundred dollars. Article 87, constitution.

We see no reason to depart from the views expressed in those decisions.

The judgment of a court without jurisdiction *ratione materiæ* is a nullity which may be urged at any time. C. P. 92, 609, 612.

It is therefore ordered that the judgment appealed from be avoided and annulled and it is now ordered that this cause be remanded to the District Court where it was instituted, to be proceeded in according to law, and that appellee pay costs of the Parish Court and of this court.

NO. 711.—PIERRE H. LEFEVRE v. EVELINA HAYDEL et al.

An appeal will not be dismissed on the ground that the record was not filed on or before the return day, when it is shown that there was no term of the court held at the time fixed, provided it was filed on the first day of the first meeting of the court after the appeal was taken.

A mortgage given by an heir on her individual property to secure her one-fifth interest in an annuity created by her father for the purchase of a lot of slaves, of which she inherited the one-fifth, is an accessory to the principal obligation, to wit, the price of slaves, and cannot be enforced. *Wainwright v. Bridges*, 19 An. 231; Constitution, article 123.

A PPEAL from the Third Judicial District Court, parish of St. Mary. *Gates, J. J. G. Oliver*, for plaintiff and appellee. *F. Fuselier*, for defendants and appellants.

TALIAFERRO, J. The plaintiff and appellee moves the court to dismiss this appeal on the grounds—

First—That the transcript of record was not filed in the Supreme Court on the return day of the appeal, nor within three judicial days thereafter.

Second—That the surety on the appeal bond is not solvent.

The order of appeal was granted on the eighteenth of May, 1867, and the transcript of appeal was filed on the first Monday of September, 1869—being the first day of the term.

There was no term of the Supreme Court held at Opelousas for the years 1867 and 1868. This ground is therefore not tenable. 18 L. 374.

The second ground is also untenable. See the case of *Gray v. Lone*, 9 An. page 478.

The motion to dismiss is therefore overruled.

On the twelfth of October, 1850, P. H. Lefevre sold to George Haydel twenty-four slaves for the consideration of six hundred dollars, to be paid annually during the natural life of the vendor, with the reservation of a mortgage on the slaves sold.

Evelina Haydel, heir for one-fifth part of the estate of her father, George Haydel, the original vendee, then deceased; executed a mortgage in favor of Lefevre on her own estate called *Corantin*, to secure the payment of her own fifth part of the life annuity due to Lefevre, principal and interest being one hundred and twenty dollars, due by her for her annual share of the life annuity due by her father, G. Haydel, to Lefevre. Subsequent to the execution of this mortgage, Evelina Haydel, the mortgager, sold the mortgaged premises to her sister, Annette Haydel. This suit is brought against Evelina Haydel *in personam*, for nine hundred and sixty dollars and interest, being her share of said annuity for eight years at one hundred and twenty dollars per year from the first of March, 1860, and against Annette Haydel in the form of the hypothecary action.

There was a declinatory exception in the record filed on the part of Evelina Haydel, alleging her residence to be in the parish of Terrebonne. We do not deem it important to consider this exception. Both defendants filed peremptory exceptions setting forth that the plaintiff had no cause of action, and Annette Haydel filed an answer alleging that the consideration of the contract sued upon was the price of slaves.

Judgment was rendered in favor of the plaintiff and defendants appeal.

The act executed by Evelina Haydel does not purport in any manner to alter or modify the original contract of annuity. On the contrary, it studiously refers to it as being the contract under which the party is bound. It shows no other interest than to secure the obligation already existing by a new and additional mortgage on her own property. It is an accessory obligation to the principal one, which it recognizes and confirms.

The consideration then being a proportional amount of the original consideration, which was the price of slaves, the contract cannot be enforced. *Wainwright v. Bridges*, 19 An. 234; State Constitution, article 128.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that this suit be dismissed at plaintiff's costs.

Mary E. Taylor, Wife, etc., v. Augustus W. Littell and H. M. Wackerhagen, Testamentary Executor.

NO. 621.—MARY E. TAYLOR, Wife, etc., v. AUGUSTUS W. LITTELL and H. M. WACKERHAGEN, Testamentary Executor.

The objection, that the petition does not state the full name and residence of the plaintiff, must be made *in limine litis* by dilatory exception.

The objection, that the plaintiff was not properly authorized to prosecute the action, must be pleaded specially in the court below.

The maker of a negotiable note has no interest in raising the question of the right of the payee to indorse it, as a payment to the indorsee and holder will protect him.

A judgment that has been rendered without a judgment by default being first taken is illegal and null.

Where a final judgment has been rendered on default, and appeal taken therefrom, the cause will not be remanded on the allegation without evidence that the consideration of the note sued on was the price of a slave.

APPEAL from the District Court, parish of St. Landry. *Bailey, J. King & Mart n*, for plaintiff and appellee. *Dupree & Garland*, for defendants and appellants.

HOWE, J. The defendants have appealed from a judgment by default on a promissory note, and have presented a number of points for our consideration. They urge that the petition does not state the residence of the plaintiff nor her full name. This objection (if not entirely frivolous), should have been pleaded *in limine*, by dilatory exception. *Parmely v. Bradbury*, 13 La. 353.

They also object that plaintiff does not appear to have been properly authorized to prosecute the action, but this defense should also have been specially pleaded in the court below. *Cochrane v. Miller*, 10 Ann. 140.

They further contend that, as the note was made to the order of Eliza M. Taylor, *tutrix*, the payee had no right to indorse and transfer it to the plaintiff; but whether this right exist or not, we think they have no interest to raise this question. A payment to the plaintiff, indorsee, and holder, would sufficiently protect them. *C. C. 2141; Bacon v. Smith*, 2 Ann. 442; *Nicholson v. Chapman*, 1 Ann. 222.

The same answer may properly be made to the objection that the suit should have been brought by the plaintiff's husband.

An examination of the record shows, however, that no default was ever taken against the defendant, Mrs. Wackerhagen, and the judgment therefore, purporting to have been made final after default, is, as against her, irregular and illegal, for want of issue joined. The counsel for appellee states that it was rendered by mistake.

The default against Littell seems to have been regularly entered and confirmed after the legal delays. The appellants assert in their brief that the obligation sued upon was given for the price of slaves, and urge that the cause be remanded, as to both defendants, in order that proof, of which there is none in the record, may be made on this point. We had occasion at the term lately held at Natchitoches, to consider

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this question in the case of the succession of Tauzin, and held that under such circumstances the case could not be remanded.

For the reasons given, it is ordered and adjudged that the judgment appealed from, as to the defendant, Augustus W. Littell, be affirmed with costs; that, as to the defendant, Mrs. H. M. Wackerhagen, the said judgment be avoided and reversed, and the cause, as to her, be remanded to be proceeded with according to law.

No. 706.—DEMOSTHENES NUNEZ, Administrator, v. THOMAS S. WINSTON.

On a motion to dismiss an appeal, the Supreme Court will not notice documents not forming a part of the record.

Notes given for the price of slaves cannot be enforced. Constitution, art. 123.

APPEAL from the District Court, parish of Vermilion. *Bailey, J. D. O. Bryan* for plaintiff and appellee, *Oliver & Dumartrait* for defendant and appellant.

HOWELL, J. A motion is made to dismiss this appeal on the ground that, before the filing of the appeal bond, the judgment was voluntarily executed by the appellant, and the appellee's counsel refers us to four documents annexed to his brief to establish the fact. Besides the objection that we cannot receive new evidence in this Court, or notice documents not forming a part of the record, these documents are not filed. We find no legal evidence of an execution of the judgment, and the motion must, therefore, be denied.

Upon the merits, a reference to the evidence in the record shows that the notes sued on were given for a part of the price of slaves, and hence their payment cannot be enforced.

It is therefore ordered, that the judgment appealed from be reversed and annulled; and it is further ordered, that there be judgment in favor of defendant, with costs in both courts.

No. 714.—SUCCESSION OF DESIRE BERAUD. Opposition to Appointment of V. A. FOURNET as Administrator.

The first applicant among creditors is entitled to the appointment of administrator, without reference to the amount or dignity of their claims against the estate. C. C. 1039.

APPEAL from the Parish Court, parish of St. Martin. *Fontelien*, Parish Judge. *Simon & Voorhies* for appellant, *Gary & Fournet* for appellee.

HOWELL, J. On the fourth day of July, 1868, the application of Valsin A. Fournet for letters of administration of the succession of Desiré Béraud, deceased, was published, and on the eleventh of the same month Richard T. Eastin filed an opposition, claiming a better

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right to the administration of said succession, on the ground that he is a creditor for a larger sum than the said Fournet, and a creditor with mortgage. The Parish Judge decided in favor of the first applicant, and the opponent has appealed.

We concur in the decision of the Judge *a quo*. By the terms of art. 1117 C. C. the Judge must give the administration to him who first made a demand, if the contestants have equal rights thereto; and this equality of right does not depend on the amount or dignity of the debts due them respectively, but upon the classes to whom the law assigns preference successively. C. C. 1114; 2 A. 97.

The act of 1854, p. 51, has amended art. 1116, C. C., so as to require the judge to appoint *one* of the several applicants to act as curator or administrator. No necessity is shown for more than one in this case.

It is therefore ordered, that the judgment appealed from be affirmed with costs

No. 716.—PIERRE PECOT & Co. et als. v. ARMELIN BROTHERS et als.

Where suit is brought by a judgment creditor against third parties to annul a sale, and a *datien en paiement* of property made by the judgment debtor to them, and they have not been made parties to the original suit, they may controvert the demand, although it be liquidated by a judgment, in the same manner that the original debtor might have done before judgment, and if the account on which the judgment is founded is prescribed, the plea will prevail as to them notwithstanding the judgment.

The purchase of lands at the succession sale of the estate of their mother by the heirs, and their subsequently planning in partnership, does not constitute them partners in the lands. A partnership which has for its object the acquisition of real estate must be in writing. C. C. 2907.

The mortgage of the wife attaches to the interest of the husband in the lands held in common before partition, to secure her claim for her paraphernal property received by him, and a *datien en paiement* to her in satisfaction of her claim is authorized. C. C. 2367, 2421.

The fact that a party owes more than his property will sell for, does not prevent him from selling, and a sale made under such circumstances will not be avoided unless fraud is shown.

APPEAL from the District Court, parish of St. Mary. *Train, J. J. G. Oliver & Dumartrait* for plaintiffs and appellees, *Simon & Voorhies* and *Gibbon & Wilson* for defendants and appellants.

LUDELING, C. J. P. Pecot & Co. et als., syndics of the insolvent firm of Darby & Tremoulet, judgment creditors of the Armelin Brothers, sue to annul the partition of certain lands among the Armelin Brothers, the sale by Theodore and Aristide Armelin to Emile Perret, and the *datien en paiement* made by Charles Armelin to his wife, Marie E. Perret.

The defendants, Emile Perret and Marie E. Armelin, have pleaded, in this Court, the prescription of three years against the account, which formed the basis of the judgment in one of the suits against their vendors and transferer. Article 1971 of the Civil Code accords this right: "When the defendant, in the action given by this section, has not been

made a party to the suit against the original debtor, he may controvert the demand of the plaintiff, although it be liquidated by a judgment, in the same manner that the debtor might have done before the judgment." 12 La. 200; 4 An. 135, *Fox v. Fox*.

The account of *Darby v. Tremoulet* was due twenty-second August, 1862. The Armelin Brothers were cited on the fifth of October, 1863. The claim was, therefore, prescribed. The account was not an acknowledged or stated account (*compte arrêté*) as contended for by the plaintiffs' counsel.

But the plaintiffs have another judgment, under which also they are proceeding, and to the extent of that debt they are interested in avoiding the sales and transfer aforesaid, if the same be in fraud of their rights. This necessitates an examination of the case on its merits. It is alleged that the land which was partitioned between Charles, Theodore and Aristide Armelin, belonged to the partnership of Armelin Brothers, and that they could not partition the property among themselves before the debts of the partnership had been paid. We have searched in vain to find any proof of the existence of a partnership of any sort before the purchase of the land. And the purchase by them, at the sale of the property, which belonged to the succession of their mother, did not create a partnership. Nor does the fact that they subsequently planted in partnership make the land bought by them the property of the partnership. There is no proof in the record to show the existence of a partnership which had for its object the acquisition of real estate, or which was intended to embrace such property. The Civil Code requires such partnerships to be in writing. Art. 2807; 2 An. 822; *Cora A. Slocomb v. De Lizardi*, 21 An. p. 355. The property was the joint property of the Armelin Brothers—C. C. 2777; and they had a perfect right to partition it. The mortgage of the wife of Charles Armelin attached to his interest in the lands even before the partition; and the *dation en paiement* to her, in satisfaction of her claim for paraphernal property received by him, was authorized by law. C. C. 2367; 2421; 2402.

The evidence in this case does not satisfy us that the sale to Perret was fraudulent. There is nothing whatever to show his want of good faith; and his vendors, Theodore and Aristide Armelin, offered to transfer to the plaintiffs the notes, secured by mortgage on the property sold, which Perret had given for the price. This certainly does not indicate a fraudulent intent on their part. The mere fact that one happens to owe more than his property will sell for, does not prevent him from lawfully selling his property.

This view of the case makes it unnecessary to notice the bills of exceptions taken by the defendants.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be avoided and reversed; and that there be judgment in favor of the defendants rejecting the plaintiffs' demand, with costs in both courts.

Charles H. Walker v. Edward Simon, Jr., Administrator, etc. J. Montgomery et al., Intervenor.

No. 709.—CHARLES H. WALKER v. EDWARD SIMON, Jr., Administrator, etc. J. MONTGOMERY et al., Intervenor.

A clerk of the District Court is not disqualified on account of his office from becoming surety on an appeal bond in an appeal from a judgment from the court of which he is clerk.

If the clerk commit a clerical error of importance in issuing citation to the appellee its only effect would be to require time to be given for a correct citation.

The filing of a transcript of appeal on the first day of the meeting of the Court after the appeal is taken is sufficient. A party does not lose his right of appeal because of failure of the Supreme Court to hold the next regular term after it is taken.

An intervenor must establish the correctness of his own claim before he can oppose prescription to the plaintiff's demand.

A PPEAL from the District Court, parish of St. Martin. *Gates, J. McMillan & Mossy*, for intervenors, appellants, *DeBlanc & Perry, Gibbon & Wilson*, for appellees.

Howe, J. A motion has been made to dismiss the appeal on five grounds which we are required to consider *seriatim*.

I. That the bond given to secure the costs was signed and approved by the clerk of the District Court of the parish of St. Martin from the decision of which the appeal is asked. The bond is signed by V. A. Fournet as surety and attested and filed by L. P. Briant, deputy clerk. The record does not inform us that V. A. Fournet was at this time, May 28, 1863, clerk of the court, but if he was he could become a lawful surety, at least where, as in this case, he did not approve the bond.
10 L. 423.

II. That the citation of appeal was issued on the twenty-eighth of May, 1863, and the sheriff made a return of the same at the citation on the second of May, 1863. The record plainly shows that this was a clerical error for the second June, 1868.

III. That the citation was made returnable on the third Monday of August, 1863.

By the citation the appellees were summoned to appear "at the next regular term of the Supreme Court." The fact that the clerk added in error, that the term would be held on the third Monday of August could mislead no one. 5 Martin 500. It certainly did not mislead the appellees in this case, who had counsel learned in the law. But if this clerical error was of importance, its only effect, since it was not the fault of the appellant, would be to cause time to be given for a correct citation; and this, in the view we have taken of the case, as will be seen hereafter, would be a vain thing.

IV. That the appeal was granted in May, 1868, but the transcript was not returned and filed in the appellate court on the third Monday of August, 1868, nor on the first day of the next term of the Supreme Court, as appointed and fixed by law, nor within three judicial days thereafter, nor within fifteen months after the citation of appeal was issued.

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It is well known that there was no court held here in 1868. The three judicial days after the return day of this appeal did not begin to run till the court was opened at the present term (1869), and the transcript was filed September 6, 1869, on the first judicial day. This was sufficient.

V. That the intervenors (appellants), have neither offered nor introduced any testimony to show that they are in any way interested in the judgment of the lower court from which this appeal was taken.

This allegation would seem to refer more properly to the merits of the intervenors' claim, which, the motion to dismiss being overruled, we will now proceed to consider.

This action was instituted upon certain mortgage notes held by the plaintiff. The defendant, as administrator, admitted, by his answer, the validity of the claim.

The intervenors alleged in their petition as follows:

"That they are the owners and holders of certain notes drawn and indorsed by Edward Simon, Sr., the intestate, and secured by conventional mortgage on the property described in plaintiff's petition, which mortgage on its face appears to rank next inferior to that of plaintiff, while in law, and in fact it has a superior rank, and ought to be paid in preference to that of plaintiff, as it is specially averred that the notes sued upon are prescribed, and which prescription they plead; and they pray that plaintiff's claim be rejected."

There was judgment rejecting the demand of the intervenors, and in favor of plaintiff, and the intervenors appealed.

Upon the trial in the District Court, the intervenors offered no evidence. The notes they claim to hold, and which are so vaguely described in their petition, were not produced; the mortgage by which they allege these notes to be secured was not exhibited, and we are unable to say that they have in any way established their debts in such form as to lay a foundation for their plea of prescription. They claim that the administrator's account, introduced by him, establishes that they have an interest as creditors to plead prescription; but an examination of the account does not justify this theory. Upon the account the intervenors figure as persons who *claim* to be creditors, but their claims are disputed by the administrator. In regard to them, the account declares: "Suits are pending in the District Court of the parish of St. Mary * * * in regard to the claims herein classed, * * * and the administrator still persists in disputing those claims. They are classed in his account, not that he acknowledges their existence, but for no other purpose than that of retaining in his hands, subject to and until the decision of the suits above referred to, the amount which the holders of those claims will be entitled to in case their suits be decided in their favor."

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The account, if relied upon to establish the intervenors' claims, must, as to such claims, be taken as a whole, and so taken, admits nothing in their behalf.

It is doubtful if the plaintiff's claim is prescribed. It is doubtful if the plea of prescription by the intervenors is made in proper form, there being no intimation given in their petition of what prescription they invoke among the many classes established by the Code. *Mansfield v. E. E. Norton*, 21 Ann. p. 395. But however this may be, it seems certain that the intervenors have not established a sufficient interest to enable them to oppose prescription to the plaintiff's demand. C. C. 3429.

It is therefore ordered, that the judgment appealed from be affirmed at appellant's costs.

No. 632.—FAUSTIN BORDELON, Administrator, v. JOSEPH D. COCO et al.

A party having purchased property at probate sale during the war, cannot set up in defense to the payment of his obligations that the sale was made on the basis of the value of Confederate notes at the time of sale, and obtain a reduction of the price bid to that extent.

A PPEAL from the Seventh Judicial District Court, parish of Avoyelles. *Levis, J. Waddill & Barbin*, for plaintiff and appellant, *Cullom & Thorpe*, for defendants and appellees.

TALIAFERRO, J. The defendant Coco, at a probate sale of succession property of the estate of Jean P. Bordelon, in February, 1863, became the purchaser of a lot of hogs at the price of five hundred dollars, and in conformity with the terms of sale executed with the other defendants two promissory notes each for one-half the price, and payable respectively in one and two years from the day of sale, with interest at eight per cent. per annum from maturity of each note. In 1866 the plaintiff, as administrator, brought suit to enforce payment of these notes, and the defendant set up in his answer that the stock purchased was not worth more than one hundred dollars in gold; that Confederate money was the only currency used in this country, and that it was expected by all parties that these notes were to be paid in Confederate money, which was then worth only twenty cents on the dollar. The judge of the lower court gave judgment for \$125 in gold, or its equivalent in current funds, with interest, etc. From this judgment the plaintiff has appealed. There is error in the judgment, in this, that it recognizes the right of the parties to deal in and, consequently, give credit to an unlawful paper currency. It assumes that they contracted with especial reference to the discharge of the debt by the payment of this illicit paper issue, and thence proceeds to ascertain the value in gold, at the time of the contract, of five hundred dollars of that currency and finds the correlative value to be \$125. This is not in express terms rendering

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judgment for the payment of five hundred dollars in Confederate paper money, but it is in substance the same thing. If the parties contracted, the one to pay and the other to receive the debt in question in that issue, as the judge *a quo* by his judgment determines they did, the contract was null *ab initio* and the suit should have been dismissed. This should have been done if such were found to be the case; if not, judgment should have been rendered for the whole amount. We find no such array of facts in this record as leaves no reasonable doubt upon the mind that the parties contracted with reference to payment in the so-called Confederate money. There is nothing to warrant the conclusion that the administrator, acting as he did in a fiduciary capacity, agreed with the defendant to receive payment in that currency. The terms of sale were fixed by the advice of a family meeting, and they certainly gave no authority to the administrator to receive payment for the minors' property in a worthless and constantly depreciating currency. If, as a witness stated, the administrator did on one occasion receive in payment a small sum under the cash limit, in paper of that character, it was at his own risk, as he was without authority to do so. There was no declaration made at the sale nor any intimation whatever given that the currency in question would be received in payment of the property of the succession. It may be reasonably supposed that the parties acting in behalf of minor children looked through the vista of two years and saw in the distance the final explosion of the paper currency then in vogue, and in which even then all confidence was lost. One witness swore that in 1863 there was gold and silver in the country; that cotton was bought with gold, and that he refused to take Confederate money in payment of debts contracted before the war.

The defendant executed his two promissory notes in conformity with the terms of sale, and bound himself to pay five hundred dollars to the estate in one and two years. If he bound himself under the belief that he was to discharge his obligation by the payment of valueless currency he wronged himself. There is nothing we find in the record that justified him in that belief.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled avoided and reversed. It is further ordered that the plaintiff have judgment against the defendants *in solido* for five hundred dollars with interest on one-half of that sum at eight per cent. per annum from the thirtieth day of March, A. D. 1864, and like rate of interest on the other half from the thirtieth day of March A. D. 1865. The defendants to pay all costs of suit.

 Francois Arceneaux et al. v. St. Clair de Benoit et al.

No. 613.—FRANCOIS ARCENEUX et al. v. ST. CLAIR DE BENOIT et al.

The several acts of the Legislature passed in 1864, 1865 and 1866, providing for the return of appeals to the Supreme Court, were enacted in the liberal spirit of reinstating the right of appeal in all cases in which it had been lost or suspended by the disorganization of the courts and the utter confusion and derangement of judicial proceedings consequent upon a state of war. These statutes should be construed liberally.

Appeals granted since the first of September, 1860, and filed at the proper places of return, on or before the return day for such appeals, are in time, although the return be made subsequent to the first Monday of March, 1866, to which time the right of appeal had been extended by the act of December, 1865. The act of March 22, 1866, is, in its spirit, an extension of the time beyond the first Monday of March, 1866.

A survey under the Spanish Government, when Louisiana was a province of that Kingdom, not made in conformity with the forms and requirement of the order, and never approved or confirmed by the Spanish authorities, is merely an inchoate title. The land embraced by such survey passed by the treaty of cession to the United States as part of the public domain, the title to which vested in the new sovereign.

Where a party having such inchoate title, with partial confirmation by the United States Government, and in order to obtain a further concession under his claim, enters into an agreement with contiguous proprietors by which they renounce their right to back concessions under the acts of Congress of 1811 and 1826, and he recognizes the full extent of their claims, he is estopped thereby, in an adjustment of boundary, from claiming limits which would conflict with those of the other party, under the pretense that his claim, under the original order of survey, has been fully confirmed by the United States.

The action of boundary cannot be prescribed against. Civil Code, article 821.

A PPEAL from the Eighth Judicial District Court, parish of Lafayette. *Martel, J. M. E. Girard*, for plaintiffs and appellees. *Gary & Fournet* and *DeBlanc & Perry*, for defendants and appellants.

TALIAFERRO, J. In this case there is a motion to dismiss the appeal on the ground that it was not brought up in accordance with the provisions of the acts of the Legislature directing the manner of returning certain appeals; one of which acts was passed in 1864, and the other in December, 1865. By the act of 1864 it was provided that all appeals should be returned to the Supreme Court at New Orleans. The act of December, 1865, directs that in all cases in which appeals have been granted from judgments of the District Courts of this State, at any time since the first day of September, 1860, the appellants are granted until the first Monday of March, 1866.

The point made by the appellees is that the appeal in this case having been granted on the twenty-ninth of September 1860, and the transcript not having been filed at the proper place for returning the appeal, on or previous to the first Monday of March, 1866, the appeal is barred. It is contended that the act of December, 1865, was specially enacted, extending the time for bringing up appeals, and the appellants not having availed themselves of the act cannot now prosecute their appeal.

In reply to this it is urged that by a subsequent law, the act of the Legislature of March 22, 1866, the time granted by the former laws was extended. That act provides that "all appeals which have been taken since the first of June, 1860, from the District Courts of this State and which are now pending and which have not been finally

determined on their merits shall be heard and determined by preference, at the places designated by existing laws, provided, the records be filed on or before the next return day after the passage of this act."

We think a proper interpretation of these several acts authorizes the conclusion that the purpose of the law maker was, by liberal provisions, to reinstate the right of appeal in all cases in which it had been lost or suspended by the disorganization of the courts and the utter confusion and derangement of judicial proceeding resulting from war in the country.

The construction of the acts of 1864 and 1865, contended for by the appellees, we think too stringent and not in unison with the spirit of the legislation on the subject. We are inclined to regard the act of 1866 as an extension of the time for bringing up appeals, and we find that the transcript of appeal in this case was filed within the time allowed by the act.

The motion to dismiss is therefore overruled.

Coming to the merits of the case we find it to be an action of boundary, involving from its character, to some extent, questions of title.

The plaintiffs allege that they are the owners of several contiguous tracts of land which they designate by numbers and display their relative position in respect to the defendants' lands by maps and diagrams. They represent them as lying in township No. 8, south of range No. 5, east, in the southwest land district of the State, and bounded on the west by the Bayou Vermilion, extending eastwardly from the bayou the depth of forty arpents, where their several tracts are bounded by the contiguous lands of the defendants, lying east of their back line. They allege their titles to these lands to be derived from regular confirmations by the United States government of Spanish grants. The answer is a general denial and an averment of ownership of the lands in question. The defendants plead the prescription of ten, twenty and thirty years. They claim under an order of survey granted by Governor Miro to Madame Louise de Favrot on the seventeenth of March, 1790. In the year 1772, the Spanish government granted to Joseph Alexander Declouet a tract of land extending by diverging lines across the Bayou Têche forty arpents deep in a westwardly direction toward the Bayou Vermilion. In September, 1789, after the death of the Chevalier Declouet, his widow, Louise de Favrot, petitioned the government for a back concession to the original grant, claiming an extension of the former tract forty arpents to the Bayou Vermilion. We have already noticed the order granted by Governor Miro upon this petition. The order was executed by Gonsoulin, who appears to have been a surveyor of that time, on the twenty-fourth of April, 1796. This order of survey, it appears, was never returned or approved by the Spanish authorities. It seems never to have been proceeded with further than the location made by Gonsoulin. The title of the Spanish

government was never divested, and consequently it passed by the treaty of cession to the United States as part of the public domain. The title under the order of survey was only inchoate and imperfect and subject to the future action of the new sovereign. 4 An. 99; 7 An. 546; 11 An. 142. In 1811 the United States confirmed a part only of this claim, viz: Sixteen hundred arpents bounded by parallel lines. Of the disposition made of the remainder we shall speak further on.

The titles of the several plaintiffs are based on grants by the Spanish Government in 1781, with regular confirmations by the Board of Land Commissioners in 1811. These confirmations are for forty arpents in depth on each side of the Vermilion, the extent of the front lines varying. These several tracts, nine in number, lie contiguous to each other, and by a survey made about the year 1854, and approved by the Surveyor General of Louisiana, are shown to run back eastwardly from the Vermilion forty arpents. By this plot of survey introduced in evidence no conflict of these tracts is shown with other lands. It is however certain from the evidence, that if the survey of the back concession of Mrs. Favrot be extended forty arpents westwardly from the original grant to Declouet on the Têche, it must inevitably conflict with the surveys running eastwardly forty arpents from the Vermilion. It is this conflict of these claims, if both are extended their full depth, that forms the gist of this controversy.

The defendants undertake to show that this difficulty has long since been settled by the ancestors of the present litigants. They show a formal notarial act executed on the sixteenth of February, 1802, before Louis Charles DeBlanc, civil and military commandant of the post of Attakapas, to which Alexander Declouet was a party on the one side, and Louis, Pierre, Alexander and François Arceneaux, Francis Carmouche, Joseph Breau and Jean Guilbeau were parties on the other side. By this act the parties agreed to establish a division line to be marked by indicia of a permanent character, and obviate for the future all cause of dissension on the subject of their boundaries. The last named parties acknowledged that on the east side of the Vermilion their claims "would reach and extend on the lands of Declouet." Along the division line agreed upon, roads were to be opened through the swamp, and mounds of earth were to be thrown up. At that time no surveys had been made of the several tracts claimed by the Arceneaux and others, but it seems that the back line of the Declouet claim would have reached to within about fourteen arpents of the Vermilion. The surveyor, who, under an order of court pending this suit in the lower court, made a survey, found no certain traces or remains of this boundary line established by the act aforesaid; but several witnesses testified to the existence of two or three mounds in the vicinity of the supposed location of the line of division. Upon the inventories of the estates of François, Pierre and Toussaint Arceneaux, tracts of land

are described as having fronts on the east side of the Vermilion and running *fourteen* arpents in depth. There is little room to doubt that there was a division line established between the parties as the notarial act purports, and that it was placed at the distance of about fourteen arpents from the Vermilion.

We shall now revert to the final action of the United States Government upon the back concession of Mrs. Favrot and to the position of the parties at that time. After having accorded to them after the change of government, by virtue of this incomplete title from the Spanish government, sixteen hundred arpents of land, the heirs of Mrs. Favrot again made application for a further confirmation under this claim, and upon it a favorable report was made to the Secretary of the Treasury by the Register of the Land Office at Opelousas, on the first of October, 1825. Register's Report A, No. 63. The claim was confirmed by act of Congress on the sixteenth of May, 1826. A plot accompanies the report showing the relative position of the back concession to Mrs. Favrot and the lands of the plaintiffs. The direction in which the back line of the Favrot concession would cross the several tracts of the plaintiffs is shown by dotted lines. Other lines shaded in blue indicate two portions of the area embraced by the lines of the back concession, and which touch, but do not conflict with any of the plaintiffs' lands. One of these portions contains 715.06 acres, the other 235.60 acres, making together 974.04 acres.

In 1820, the heirs of Mrs. Favrot procured from the then owners of the several tracts belonging now to plaintiffs a renunciation of their rights to the back concession to their lands, accorded by law of Congress in 1811, and extended in 1820. And this renunciation was shown in their application reported upon by the Register first of October, 1825, and is recited in the report. It is in these words: "We, the undersigned persons whose lands front on the Bayou Vermilion and extend in depth to the lands belonging to the legal representatives of the late Madame Louise Favrot, widow of Mr. Alexander Chevalier Declouet, do hereby renounce expressly all right of preference whatever which we might have under the pre-emption law of 1811, which has been revived by the act of Congress of the eleventh May of the present year; it being well understood by us and the neighbors in general that the lands back of our respective tracts was, or ought to have been embraced in the concession made by Governor Miro to the said widow, of the second depth of the land which has been granted to her husband. For which reason we think it but just that the government of the United States do confirm the said heirs, etc., in their right and title to the said land, and we ask permission to recommend the renewal of the confirmation to them of the title to the vacant land lying south of the land of Mr. Jean Gilleau, and between the back lines of the land of the said heirs and the left bank of the Bayou Vermilion as an equiva-

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lent for the interference of our lands with those of the said representatives, as set forth in the plot. Parish of St. Landry, twenty-eighth December, 1820." [Here follow the signatures of the parties.]

The report also recites that the Favrot heirs "expressly disclaimed any intention or wish to disturb their neighbors in their possessions, and therefore have confined their claim to those parts represented in the said plot by the lines shaded with blue."

The land claimed in the application for confirmation was represented as containing "about nine hundred and twenty superficial acres, American measure." This is less than the contents of the two portions of the area of the front concession before referred to, by 54.04 acres.

The plaintiffs hold that these acts of the defendants conclude them against any further claim under the order of survey granted in 1790 by Governor Miro as a back concession to Mrs. Favrot; that they have acknowledged the plaintiffs' claims, to their full extent, by obtaining the plaintiffs' renunciation, in 1820, of their right of pre-emption to their back lands—a renunciation made for the benefit of the defendants—and by limiting their claims to the lands represented on the map by the lines shaded with blue. They further contend that the defendants, by the act of Congress of sixteenth May, 1826, have been accorded all the land they prayed for, and should not be allowed now to claim, by a third extension of the old order of survey, an additional quantity of more than a thousand acres to be taken from the lands of the plaintiffs. A retrospect of the attitude and claims of the parties may now not be out of place. And first we will look at the order of Governor Miro of seventeenth March, 1790. That order is as follows:

"NEW ORLEANS, March 17, 1790.

"The surveyor of this province, Don Carlos Lareau Trudeau, will establish the party upon the second depth of land which is solicited and described in the widow's memorial, it being well understood that the second depth shall not exceed forty arpents, being vacant and not causing any prejudice to the neighbors, he will extend his proceedings in continuation hereof, signing the same with the aforesaid neighbors, and he will remit the same to me in order to provide the person interested with a title in form.

(Signed)

ESTEVAN MIRO."

This order is clear and explicit. It contains conditions that the lands to be surveyed shall be vacant, and that the survey shall cause no prejudice to the neighbors. The grants to the plaintiffs' ancestors were made in 1781, nine years before the above order of Governor Miro. It is not shown that the plaintiff's lands were surveyed at that time, nor that they might not have been located elsewhere on the Vermilion. The recommendation indorsed upon Madame Favrot's petition states that the adjoining lands, except the front, belonged to the king's do-

main. The survey of Gonsclin was not made until April, 1796. Six years afterward the parties entered into the compromise before the notary.

In the absence of anything shown to the contrary it is not unfair to presume that these grants had a fixed place for their location. At all events Declouet recognized them, and the *Locus in quo* was not questioned or disputed. It may then be a matter of some doubt whether the location of the back concession was made upon vacant land or "without prejudice to the neighbors." However this may be it is not now important to inquire, as the claimants of the lands on the Vermilion waived and yielded a portion of their lands in order to preserve peace and amicable relations with, as it may possibly have been, their more wealthy and influential neighbor. It is worthy of note the manner in which the United States government has dealt with this order of survey. It seems to have carried out, in every respect, the conditions fixed by Governor Miro. The original order does not direct the extension of the diverging lines, a rather unusual mode, under the the Spanish Government, of locating surveys. The order declares that the second depth shall not exceed forty arpents. The confirmation of the sixteen hundred arpents in 1811 gave that quantity within parallel lines, although in the rhomboidal form.

Next we see that the report of the Register's No. 63, letter A, shows a disclaimer on the part of the applicants to disturb other parties or interfere with their limits, and also to show a formal renunciation by the persons having adjacent lands, their right to enter their back lands, by preference. The quantity, represented to be about nine hundred and twenty acres, was thus, as it clearly appears, confirmed by the act of Congress of May, 1826, under the belief and intention that the confirmation was to injure or interfere with the rights of no other person. The lots or sections numbered 44 and 108, and marked "Louise De Favrot, Register's Report A, 63," on the map marked J, introduced in evidence, gives the quantity of land claimed under the application forming the subject of that report, and leaves entire and free from confiction the lands of the plaintiffs.

We think the law and equity of the case are with the plaintiffs, and that the defendants, from the course they have pursued in pressing a second confirmation upon the Government, have estopped themselves from claiming any portion of the plaintiffs' lands under the order of survey. This being an action of boundary, the plea of prescription does not apply. The judgment of the lower court, with some amendments in the designation of boundary, should be affirmed.

It is therefore ordered, adjudged and decreed that the boundary between the lands of the parties be and the same is hereby established as follows, to wit: Beginning on the Bayou Vermilion at the southwest

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corner of the tract of Jean Gilbeau, and running thence southeastwardly along the lower side line of said tract to the extremity of said line the depth of forty arpents more or less; and thence northwardly following around the end lines successively of the several contiguous tracts as shown by the line shaded with blue, to the point where the said line intersects the upper or northern side line of the tract of Joseph Breaux at the northeast corner of said tract; and thence westwardly along said side line to its extremity on the Bayou Vermilion. The lines, corners, etc., here designated, are given as the same appear upon the map marked J, introduced in evidence in the case.

It is further ordered that the defendants pay costs in both courts and it is further ordered that the judgment of the lower court, as thus amended, be affirmed.

NO. 651.—FRANCIS P. PITRE, Senior, et al. v. WILLIAM OFFUTT and others.

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A steamboat engaged in carrying cattle and other live stock from different ports of the country to New Orleans for market, is responsible for the loss of the cattle while on board, when it has occurred through carelessness or negligence.

It is no defense in case of loss while the stock is on board, for the boat to show a custom to the effect that they took no risk in case of losses of this kind. To make the defense good that such a custom prevailed, it must be shown that the shipper had full knowledge of the custom at the time of shipment, and that he delivered the stock on board with reference to the custom.

A PPEAL from the District Court, parish of St. Landry. *Bailey, J. Moore & Morgan*, for plaintiffs and appellees, *Dupre & Garland*, for defendants and appellants.

TALIAFERRO, J. This is an action brought by the plaintiffs against the defendant and others, owners of the steamer "Aline," for the value of eighty-seven calves shipped by them on the steamer destined to New Orleans, and which they allege the defendants failed to deliver according to their agreement. They claim eight hundred and seventy dollars, the value of the stock and interest on the amount claimed.

The answer is a general denial of the plaintiffs' allegations. Judgment was rendered in favor of the plaintiffs for five hundred and twenty-two dollars with legal interest from judicial demand.

The defendants have appealed.

The facts seem to be that the cattle were shipped on the steamer at or near the town of Washington on the Courtableau, and that finding great difficulty at the low stage of water then existing to pass bars and other obstructions at a lower portion of the bayou called "Little Devil," the cattle were turned off the boat to lighten her. The country around for a considerable distance being low, marshy and uninhabited

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the cattle wandered off without any effort being made by the managers of the boat to have them taken care of.

It is shown that it is not usual for boats to give bills of lading for freight of this kind; it appears that boats were in the habit generally of transporting beef cattle to New Orleans on this route, and that the plaintiffs' lot of calves was taken on board the Aline for the purpose of being carried to that market. A witness, formerly a clerk on board the steamer, testifies that the steamers "Aline" and "Perret" "never gave récépts for stock and never were responsible for the lives of stock shipped thereon."

This he states further "is a well understood regulation followed by all steamboats in the cattle trade," and adds that he is sure the boats named never made an exception.

This is the only witness who mentions such a usage as the one he spoke of, and we are unable to find that a knowledge of the existence of such a regulation, even if available for the defendants, was brought home to the plaintiffs.

The officers in charge of the steamer received the stock on board with full knowledge of the impediments in the way of navigation, and of the vexations which the "Little Devil" had in store for them. We see nothing in the defense which will justify an exemption of the defendants from the responsibilities of common carriers.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs. 10 An. 413; 11 An. 43, 427; 12 An. 783.

NO. 723.—BLANCHIN & GIRAUD v. C. C. PICKETT et als.

An account stated and closed by the written acknowledgment of the other party, is only prescribed by ten years. 14 An. 654; 20 An. 116.

Interrogatories that have not been answered on or before the trial, will be taken as confessed, where there is no order of court requiring the defendant to answer in open court.

An administrator is bound to answer interrogatories propounded to him in a suit against the estate he represents.

Personal service of interrogatories on the party interrogated is not required. C. P. 187.

APPEAL from the District Court, parish of St. Landry. *Porter, J Dupre & Garland*, for plaintiff and appellee. *John E. King* and *G. W. Hudspeth*, for defendants and appellants.

HOWELL, J. The defendants are sued as owners of a steamboat for the amount of an account. The defense is a general denial, with a special denial by one of the defendants, T. C. Anderson, of his ownership, and by another that he notified one of the plaintiffs not to give credit to the said steamboat as he would not be responsible for the debt, and they all plead the prescription of one, two, three, four and five years.

 Blanchin & Giraud v. C. C. Pickett et als.

By an amended petition interrogatories on facts and articles were propounded to all the defendants, which, on the day of trial, were taken as confessed, except as to defendant Anderson, and upon the introduction of further evidence, judgment was rendered against the other defendants, who have appealed.

The prescriptions pleaded do not apply, as the account is not open, but closed by the written approval of C. C. Pickett, the captain of the boat, and is prescribed by ten years. 14 A. 654; 20 A. 116.

It is objected that the interrogatories were erroneously taken as confessed, because—

First—There was no order of court to answer. This was not necessary, as the defendants were not required to answer in open court. 11 A. 173; 14 L. 260; 10 L. 516; 7 L. 522.

Secondly—Because a failure, by one of the defendants, Hudspeth, sued as administrator, to answer, could not bind the estate. We know of no law to sustain this position. It has been held that interrogatories may be propounded to an executor (6 M. 730), and an administrator is no more exempt. The latter is presumed to know the property belonging to the estate administered by him.

Thirdly—Because the service, on two of the defendants, Pitro and Pickett, was constructive and not personal, and as to them, the judgment is erroneous.

The service upon each was made in conformity to article 189, C. P. A *personal* service is not required. The case in 2 A. page 11, does not hold that personal service is necessary, but that a special notice of the order (where one is required), and of the day fixed for answering, must be given to the party interrogated, and that a notice to answer on the day of trial, without specifying the day, is insufficient. This authority does not apply to the case at bar.

We find no error in the judgment.

It is therefore ordered that the judgment of the District Court be affirmed with costs.

Rehearing refused.

No. 692.—L. ROCHIAUX v. H. BOUILLET, Wife, etc.

The holder of a promissory note cannot be permitted to prove by interrogatories propounded to the husband, in a suit against the wife, that the note sued on was signed by him as her agent.

A PPEAL from the District Court, parish of St. Mary. *Gates, J. J. G. Oliver & Dumartrait*, for plaintiff and appellee, *A. L. Tucker*, for defendant and appellant.

HOWELL, J. This suit is brought to recover the amount of a note subscribed in 1861, by "Vve. G. Bouillet per B. Martel," from the

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defendant, Hermina Bouillet, wife of said B. Martel, and sole, unconditional heir of said Vve. G. Bouillet, who died in 1862.

The answer is a general denial.

Our attention is first directed to a bill of exceptions taken by the defendant to the admission of her husband's answers to interrogatories, as evidence against her, to prove his authority as agent of the deceased, to sign the note sued on. The objection of the defendant, that her husband could not be a witness for or against her, was well taken and should have been sustained. C. C. 2260; *Simmons v. Sheriff*, 21 A. 421.

Without this evidence there is no express and special authority shown in B. Martel to make and sign notes for the deceased, as required by article 2966. The plaintiff has consequently failed to make out his case.

It is therefore ordered that the judgment appealed from be reversed and that there be judgment of nonsuit in favor of defendant with costs in both courts.

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No. 638.—GEORGE GLIDDON et al. v. DANIEL GOOS.

Parol evidence is inadmissible to prove a service of citation or copy of petition.

APPEAL from the Eighth Judicial District Court, parish of Calcasieu. *Bailey, J. Louis Lereque* for plaintiff and appellee, *George H. Wells* for defendant and appellant.

TALIAFERRO, J. This is a suit to revive a judgment.

The defendant, by his counsel, filed a peremptory exception, alleging that plaintiffs have no cause of action because the plaintiffs do not aver that they are the owners of the judgment sought to be revived, nor that defendant is indebted to them. He further excepts that no authority is shown in John S. Walton, who, in the petition, purports to act as the agent of the other plaintiffs.

The exception we think was correctly overruled.

The petition, in respect to the parties named as plaintiffs, is to some extent indistinct, but it is sufficiently clear who are the parties suing and the purpose for which they sue. The petition is that of Gliddon, Palmer, McLean and Elizabeth Clark, of the parish of Orleans, and of Walton, of the city of New Orleans "agent and attorney in fact" of the four persons named. These parties, as plaintiffs, aver that "on the twenty-seventh of March, 1858, the said plaintiffs herein, Gliddon, Palmer, McLean and Elizabeth Clark, in this court obtained a final judgment against the defendant for \$1250," etc.; that "they are desirous of having the said judgment revived in the manner and form prescribed by law," "wherefore, the premises considered, your petitioners pray," etc. Here we think is an allegation of a sufficient right to ask for the revival of the judgment. The addition of the name of Walton, the attorney in fact, as a party plaintiff, to those of his

George Gliddon et al. v. Daniel Goss.

principals may be regarded as surplusage. The four parties named were the original plaintiffs in the suit of March 27, 1858, in which they obtained the judgment which they now seek to revive. The same plaintiffs now pray for a revival of the judgment. Appearing themselves for that purpose, the name of the attorney in fact in the petition, with theirs is nugatory. He sets up no right or interest in the judgment. The matter is entirely between the defendant and the same parties who obtained the original judgment against him. *Utile per inutile vitiatur.*

On the trial of the exception the defendant's counsel objected to the introduction of witnesses to prove that at the time copies of the petition and citation were served on the defendant there was also served upon him a copy of the petition in the suit of March 27, 1858. He further objected to the proof by parol, of the service of such copy, as its service, if made, could only be shown by the return, in writing, of the officer who served it. The objections were overruled, the testimony admitted and the defendant reserved his bill of exceptions. The exception should have been sustained. The evidence, however, is immaterial to the issue.

The plaintiffs on the trial of the exception introduced the original petition, the one in the suit of March 27, 1858, to show identity of parties. There was no necessity to show that a copy of it had been served upon the defendant. On the merits the case is with the plaintiffs. Their case is fully made out and judgment was rendered in their favor. The bill of exceptions taken on the trial on the merits contains matter in substance the same as that embraced by the previous exceptions and was properly overruled.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

No. 612.—E. EWING, Administrator, v. G. W. Root et al.

Damages will be allowed the appellee when prayed for, if the record shows no legal ground for taking the appeal.

APPEAL from the District Court, parish of Vermilion. *Bailey, J. R. F. Patton* for plaintiff and appellee, *M. E. Gerard* and *R. S. Perry* for defendant and appellant.

HOWEL, J. The defendant, Elias Lindstrum, has appealed from a judgment on default against him, rendered upon three promissory notes, amounting to \$1500 exclusive of interest.

In his brief he urges that he has a good defense, but no sufficient reason is shown why a defense could not have been made in the Court below. The proceedings are all regular, and more than the usual legal delays occurred before judgment by default was made final, which is fully sustained by the evidence.

The appellee has prayed for damages, which, under the circumstances presented in the record, must be allowed.

It is therefore ordered that the judgment appealed from be affirmed, with one hundred dollars damages and costs of suit in both courts.

George W. Hudspeth, District Attorney, etc., v. Adolph Garrigues.

No. 731.—GEORGE W. HUDSPETH, District Attorney, etc., v. ADOLPH GARRIGUES.

A party having held an office before the war, which required him to take an oath to support the Constitution of the United States, and after the passage of the secession ordinance by the State having accepted and filled the office of clerk of one of the District Courts of the State, is not disqualified from holding office by the act of Congress of 1868, admitting Louisiana to representation in Congress, nor by the fourteenth amendment to the Constitution of the United States.

The holding of the office of clerk of the District Court, while under the authority of the State while in rebellion, was not of itself an act of rebellion.

APPEAL from the District Court, parish of St. Landry. *Porter, J.* *George W. Hudspeth*, District Attorney, for plaintiffs and appellees, *Bailey & Estilette, Henry L. Garland, J. H. Overton, Moore & Morgan* and *George R. King* for defendant and appellant.

Howe, J. This action was instituted in behalf of the State, under the provisions of the act of October 15, 1868, and a judgment was asked decreeing the defendant to be a usurper of, and intruder into, the office of Parish Judge of St. Landry, and ordering him to deliver the office, with its appurtenances, to John Amrein, who was made a party plaintiff.

The petition alleges that the defendant unlawfully holds the office, being prohibited therefrom by the provisions of the fourteenth amendment of the Constitution of the United States; and by the provisions of an act of Congress of June 25, 1868, admitting the State of Louisiana to representation in Congress; it being averred that he took an oath as a judicial officer [of the State] to support the Constitution of the United States, and subsequently engaged in insurrection and rebellion against the same and gave aid and comfort to the enemies thereof. It was also alleged that he had forfeited his office and the same had become vacant by his failure to file in the office of the Secretary of State the oath of eligibility prescribed by act No. 39 of the statutes of 1868.

The defendant answered by a general denial; asserted that he was qualified to hold the office and had been duly elected and commissioned, and denied that Amrein had ever been legally appointed or qualified.

After a trial upon the merits, the Court gave judgment for plaintiff, and the defendant has appealed.

The evidence in the case is chiefly documentary, and it appears that the defendant held the office of Parish Judge before the late rebellion, and, as such, took an oath to support the Constitution of the United States; that on the seventh November, 1861, he was appointed clerk of the District Court for the parish of St. Landry to fill a vacancy, and that he held the office for some years thereafter. The first question that arises in the case, then, is, in the language of the plaintiffs' brief:

George W. Hindspeth, District Attorney, etc., v. Adolph Garrigues.

“ Was holding the office of clerk of the District Court in the parish of St. Landry, during the rebellion, and under the authority and jurisdiction of a State acknowledged as one of the Confederate States of America, after having held the office of Parish Judge ‘engaging in insurrection or rebellion against the United States, or giving aid and comfort to the enemies thereof?’ ”

In solving so doubtful and delicate a question as this, we must not be unmindful of the complicated nature of modern civilization. The State is not a tribe of barbarians, who may be engaged in a rude agriculture to-day and transformed *in toto* to a band of warriors to-morrow. The necessities of civil life will still exist in a civilized society no matter how extensive and desolating may be the ravages of war. Property must be bought and sold, offenders against the criminal laws must be arrested and punished, private rights must often be adjudicated, successions must be opened, the claims of heirs, minors and married women must be ascertained and protected; and therefore, it might well be that in the parish of St. Landry, during the late rebellion, the office of a clerk of court might exist as a necessity without the discharge of its duties being considered in any enlightened view an engaging in insurrection or rebellion, or giving aid and comfort to the enemies of the United States. If, in 1861, every citizen of this parish, except those who were absent in the rebel army, had been a devoted friend of the United States, would it have been their duty to refrain from holding these minor local offices, and by leaving them vacant allow society to relapse into a chaotic condition? We think not. On the contrary, we apprehend that there could be nothing in the discharge of the legal duties of such offices that could be considered as taking part for or against, or giving aid or comfort to, either one side or the other in the great controversy. And in the special case before us we are constrained to think that if the defendant confined himself to his legitimate duties as clerk (and there is no evidence that he did not), the fact that he held the office simply would not go to disqualify him under the act of Congress of June 25, 1868, admitting Louisiana to representation, and the fourteenth amendment to the Constitution of the United States.

If, in legislative, or other official capacity, he had been engaged in the furtherance of the unlawful purposes of the insurgents, when the duties of his office necessarily had relation to the support of the rebellion; if he had held a position created for the purpose of more effectually carrying on hostilities, or whose duties appertained to the support of the rebel cause; or if he had in some way misused the office he did hold to forward the designs of the enemies of the United States; the case would have been very different. But, so far as we are advised by the record, he performed only clerical duties, such as belonged to a state of peace, and were designed to preserve civil order and administer civil law.

George W. Hudspeth, District Attorney, etc., v. Adolph Garrigues.

The point that the defendant has forfeited the office he now holds by failing to file an oath of eligibility as required by the act No. 39 of the laws of 1868, has already been settled adversely to the claims of plaintiffs by the decision rendered lately at Monroe in the case of *Downes v. Towne*, and is not now insisted upon by counsel.

We are of opinion that the plaintiffs have failed to establish their case by sufficient evidence.

It is therefore ordered and adjudged that the judgment appealed from be avoided and reversed, and the suit dismissed at the costs of the co-plaintiff, John Amrein.

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116 57

NO. 733.—AUGUSTIN GUILLORY v. ALEXANDER D. DEVILLE et als.

The statute of 1866, exempting certain property from seizure under execution, is in derogation of common right, and the exemptions from seizure will not be extended to objects not expressly designated in the law.

The prescription of five years cannot be invoked in a case where judgment has been rendered on the note, and execution and garnishment process has issued and judgment against the garnishee has been rendered from which an appeal has been taken by the original judgment debtor. In such a case the note becomes merged in the judgment, and five years prescription does not apply.

APPEAL from the District Court, parish of St. Landry. *Porter, J. Dupre & Garland*, for plaintiff and appellee. *B. A. Martel*, for defendants and appellants.

LUDELING, C. J. The plaintiff, having obtained a judgment against A. D. Deville, caused an execution to be issued against him and garnished J. B. Victorienne. Victorienne acknowledged that he was indebted to A. D. Deville, and there was judgment against him for the sum he confessed to owe.

The defendant, A. D. Deville, in the District Court, alleged that he was entitled to the benefit of the law entitled "an act to exempt from seizure and sale a homestead and other property," adopted on the twenty-second December, 1865, and he urged that no judgment should be rendered against Victorienne, his debtor, for the amount confessed by him, because he, Deville, did not own property to the amount of two thousand dollars, exclusive of the debt seized.

The object of the law is clearly indicated by its title. It is "to exempt from seizure one hundred and sixty acres of ground and the buildings and improvements thereon, occupied as a residence, and one work horse, one wagon or cart, one yoke of oxen, two cows and calves, twenty-five head of hogs, or one thousand pounds of bacon, or its equivalent in pork, and, if a farmer, the necessary quantity of corn or fodder for the current year; provided that the property herein described shall not exceed in value two thousand dollars," etc. This statute is in derogation of common right, and must be strictly con-

Augustin Guillory v. Alexander D. Deville et als.

strued, and the exemption from seizure will not be extended to objects not expressly designated in the law.

The thing seized is not exempted from seizure. The plea of prescription is untenable. The note was merged in the judgment and we cannot go behind the judgment.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed and that the appellant pay the costs of appeal.

No. 648.—E. N. CULLOM v. WILLIAM MOCK.

In fixing the value of the services rendered by an attorney in a litigation in which he has been engaged, the court will not be governed exclusively by the estimate of the witnesses, but will look into the whole record and form an estimate founded on the usual charges made for such services as appear to have been rendered.

APPEAL from the District Court, parish of Avoyelles. *Lewis, J. E. North Cullom* (in person), plaintiff and appellee, *Taylor & Irion*, for defendant and appellant.

TALIAFERRO, J. The plaintiff sues to recover one thousand dollars, which sum he alleges is due him by the defendant for attorney's fees. The defendant admits that he engaged the plaintiff's services as attorney, but avers that the plaintiff failed to be present and give his personal attention to the suit on appeal and that he was on that account compelled to employ other counsel.

The plaintiff had judgment in his favor for the amount claimed, with five per cent. interest from the fifteenth of September, 1866. From this judgment the defendant appeals.

It is not denied that the plaintiff is entitled to remuneration, but it is contended that the value of the services rendered has not been clearly established. It is further objected that the judgment of the lower court is erroneous in allowing interest from the fifteenth of September instead of from the thirty-first of October, the date of the signing of the judgment.

We gather from the record that the plaintiff was engaged in the inception of the suit and conducted it through the District Court; that the case was an important one and much complicated; that the trial in the lower court occupied several days, and that the plaintiff had spent much time and labor in preparation for the trial. It further appears that he furnished an elaborate brief for the appellate court, and was prevented from being personally present by sickness. On the other hand, it appears that in June, 1866, after the trial in the District Court, plaintiff made a visit to Kentucky. During his absence, the defendant employed eminent counsel to attend and argue his case in the appellate court. The counsel thus employed, it is shown, examined the

brief furnished by the plaintiff, and remarked that he had no objection to it, and made only a few additions to it, and these of an unimportant character. The defendant swears that in consequence of the absence of the plaintiff he was compelled to employ other counsel to whom he paid seven hundred dollars. It seems that the defendant felt much solicitude as he naturally would do having large interests at stake; and we cannot but think it commendable prudence in him to provide against the possible contingency of the plaintiff's failure to return in September to attend the appellate court. It is always important that the leading counsel in a case, the one presumed to be more familiar with the subject in all its bearings than any other person, should be personally present at the trial. Of this advantage the defendant was deprived, although he was successful on the final trial, and the plaintiff did all in his power to compensate his own unavoidable absence. By the rules which have guided this court in relation to fees for professional services it has not been governed wholly by the opinions of witnesses regarding the value of the services rendered, especially where these opinions have not been corroborated by other evidence. A counsel fee is in its nature *honorarium* and not *merces*; and the fixing its amount is a matter of much delicacy, and one in which the court must be regulated by a conscientious estimate of the value of the services. In this case no specific agreement as to the compensation to the counsel seems to have been made. And no specific sum is fixed by any of the witnesses as the value of the services. Nevertheless, it is shown that the defendant recovered ninety-five bales of cotton, and that at that time cotton was worth from thirty to thirty-five cents per pound. Two of the witnesses say the usual fee in such cases is ten per cent. of the amount recovered. This is perhaps the approximate basis upon which the judgment of the lower court rests as to the amount. Upon a review of all the facts presented, we think the judgment should be reduced, and that eight hundred dollars should be awarded the plaintiff as a liberal compensation. As to the time from which interest should run, we think the lower court did not err in fixing it at the time of the termination of the suit.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. And it is further ordered, adjudged and decreed that the plaintiff recover from the defendant eight hundred dollars, with five per cent. interest thereon from the fifteenth day of September A. D. 1866. It is further ordered that the defendant and appellant pay the costs incurred in the lower court, and the plaintiff and appellee those of this appeal. 5 N. S. 399; 3 An. 518; 4 An. 578, 503; 11 An. 637.

Alcibiade Deblanc, Tutor, etc., v. Pierre Gary, Administrator.

No. 634.—ALCIBIADE DEBLANC, Tutor, etc., v. PIERRE GARY,
Administrator.

The surviving husband having qualified as natural tutor to his minor children, and caused an inventory of the community property to be made, and on that basis caused the one-half interest of the wife in the community to be adjudicated to him, for which he executed a special mortgage in favor of the heirs on his own property, and he dies, and a dative tutor is appointed to represent his minor children; the dative tutor, thus appointed, may vote at the deliberations of the creditors to dispose of the property of the deceased, an insolvent. The dative tutor as mortgagee for the minors, without reference to the amount, may demand as against the ordinary creditors, that the property be sold for cash or part cash. A peremptory exception that the petition discloses no cause of action, admits for the purpose of its consideration, all the allegations in the petition to be true.

APPEAL from the District Court, parish of St. Martin. *Gates, J. R. Perry*, for plaintiff and appellant, *Gary & Fournet*, and *A. & F. Voorhies*, for defendant and appellee.

Howe, J. In the year 1856, Désiré Béraud was confirmed as natural tutor of his minor children, Corinne and Désiré, issue of his marriage with Corinne Deblanc. An inventory of the property owned in community with the deceased wife was made, amounting to \$5178. The debts of the community were \$1500. By the advice of a family meeting, the proceedings of which were homologated by a judgment of the court of March 10, 1856, the property belonging to the community was adjudicated to the surviving husband, including the lots of ground hereinafter mentioned, and a mortgage retained to secure the share of the minors. The certificate of adjudication was recorded March 11, 1856. In 1865 Désiré Béraud, the elder, died insolvent. At a meeting of creditors, a majority in number and amount voted to sell the property on a credit of one, two and three years.

The plaintiff in this case, who had in the meantime been appointed dative tutor of the minors, voted in favor of selling the immovable property mortgaged in their favor for one-half cash and the balance on a credit of about one year.

Upon the petition of the defendant, who had been appointed and qualified as administrator, the proceedings of the meeting of creditors were ordered by the clerk of the court to be homologated and carried into effect, and the property sold on a credit of one, two and three years.

The sale being advertised, the plaintiff brought this suit to enjoin the same. He alleged in his petition the indebtedness of the deceased, Béraud, to the wards, secured by tacit mortgage on his property, and by special mortgage on certain lots in St. Martinsville, adjudicated to him as before mentioned in 1856; that at the death of the minors' mother he was in good circumstances, and none of the debts now claimed against his succession were in existence, that at the meeting of creditors of Béraud the plaintiff had voted in the manner we have mentioned, but that in disregard of the conditions of sale fixed by him

the defendant was about to sell on other and different terms the property subject to the tacit and special mortgages of the minors, and that the minors actually stood in need of the proceeds or a portion thereof.

The defendant filed a peremptory exception, that the petition disclosed no cause of action, inasmuch as it appeared by the petition itself that the minors' rights have not been previously settled and liquidated as the law contemplates, in order to enable the minors' tutor to vote in the deliberation of creditors.

The court sustained the exception, and dismissed the suit, and the plaintiff has appealed.

Our insolvent laws provide that the wife in partnership with her husband or *his* heirs shall not be allowed to vote in the deliberations of creditors, unless their rights shall have been previously settled by a partition or a judgment for a separation of goods.

"*His* heirs" is probably a typographical error for "*her* heirs," as the statute refers to a living insolvent, and the latter phrase is used in the law of 1842. Statutes 1855, p. 434, § 16; See also the French text.

It is also provided in respect to insolvent successions, that, in the choice of syndic, the sale of property, and the administration and settlement of the estate, the same forms shall be observed as are prescribed for the administration of estates ceded by insolvent debtors, reserving to the heirs all their rights and claims as creditors. Statutes of 1855, p. 399, § 4.

Under similar provisions of law it was held in the case of *Lesseps v. His Creditors*, 7 Ann. 624, which was a contest for the election of a syndic, that the votes given by the daughter of the insolvent and by the insolvent himself as tutor of his minor children were illegally given, because the community right of their deceased mother "had not been previously settled by a deed of partition or judgment for a separation of property." But that case differs from the one at bar in some important features. The question was of the election of a syndic, and that was to be determined by a majority of creditors in amount, and a single dollar might have decided the contest between the rival candidates. In such a contest, the exact amount of the minors' claim might be of supreme moment; but in the case at bar it might be sufficient to maintain the plaintiff's action that the claim of the minors as mortgagees should be established for any sum, since a mortgagee even for the smallest amount has a right, as against the ordinary creditor, to claim a sale for cash or partly cash. Statute of 1855, p. 434, § 17.

Again, in the case of *Lesseps*, a protest was made before the notary against the votes, and the judgment which declared them valid was appealed from. In the case at bar, no exception was made to the vote of plaintiff, which was founded upon his uncontradicted affidavit of the amount due.

But a more important distinction than either of these is, that while in the case of Lesseps there had been no settlement of the rights of the heir and minors, and votes in their behalf were properly decided to have been illegally received, in the case at bar it appears that long ago, at a time free from suspicion, when Béraud was in good circumstances, and owed none of the debts which now encumber his succession, the property of the community, which had existed between him and the mother of the minors, was inventoried and appraised, and then adjudicated to him at the estimated price. A definite debt was thus established, a definite mortgage created. The practical effect of the adjudication was that of a partition by licitation, where the owner of an undivided half buys the whole property and remains indebted to the other owners in common for one-half the price.

In this view of the case, and considering the familiar principle that the exception of no cause of action admits for the purposes of its consideration the allegations of the petition to be true, we are constrained to the conclusion that the exception should have been dismissed.

It is said in the exception itself, and contended in argument, that the petition itself shows that the claim of the minors is unliquidated, but we do not so understand it. The petition, indeed, asks "that in case it be disputed by the creditors, the claim of the wards against the estate of their father be recognized, and its amount fixed without regard to that mentioned in the deliberations of the creditors, or in this petition, but according to what may be established by the evidence;" but this is in the alternative only, and cannot, by hypothesis merely affect the rights of the minors, as fixed by the facts which otherwise appear.

It is therefore ordered that the judgment appealed from be reversed, the exception dismissed, and the cause remanded to be further proceeded with according to law, the appellee as administrator to pay the costs of the appeal.

No. 130.—Monition of JOHN HALL. Opposition of F. E. LAURENCE AND HUSBAND.

The wife is sufficiently authorized, if, in a proceeding by executory process to sell her mortgaged property, both she and her husband are made parties defendant.

The averment in the petition that the defendants are non residents is sufficient to authorize the appointment of an attorney to represent them in a proceeding *via executiva*.

The court will notice judicially who are its attorneys, and where it appears that an attorney has been appointed *curator ad hoc*, the phrase *curator ad hoc* will be treated as surplusage and the appointment be regarded as that of attorney to represent the absentee.

The attorney appointed to represent the absentee in a proceeding *via executiva* is the proper party to whom notice of seizure must be addressed, and on whom service must be made.

The readvertisement of property that has been once offered for sale is sufficient notice to all parties interested.

The law does not require the sheriff to return an order of seizure and sale in seventy days, retaining a copy where it has not been fully executed, the same as in case of a *f. fa.* The direction by the clerk to return the order in seventy days has no legal effect.

APPEAL from the District Court parish of St. Mary. *Gates, J. J. G. Oliver & Dumartrait*, for plaintiffs and appellees, *Edward Simon*, for opponents and appellants.

Howe, J. On the fifth of January, 1867, by virtue of an order of seizure and sale, issued in executory proceedings in the suit of Hall, Rodd & Putnam *v.* Mrs. F. E. Laurence and husband, a plantation belonging to Mrs. Laurence was sold by the sheriff of St. Mary for cash at a little more than its appraised value and purchased by the appellee, John Hall.

The appellants, Mrs. Laurence and husband, opposed the confirmation and homologation of the monition afterward sued out by appellee on several grounds, which we will notice in the order in which they have been presented in the brief of their counsel.

I. That Mrs. Laurence was never authorized by her husband or by the judge to appear in the proceedings *via executiva* prior to the judgment therein.

The record shows that both husband and wife were made parties defendant, and that suffices.

II. That there is no necessity shown for the appointment of a *curator ad hoc* to the parties sued, because their absence from the State at the time is not sufficiently established by positive and competent evidence.

The petition of the plaintiffs in the executory process averred that Mrs. Laurence and her husband resided somewhere in New York or New Jersey, and were absent from Louisiana, and not represented therein. We deem this sufficient. *Frost v. McLeod*, 19 Ann. 80. The opponents in this proceeding have not even attempted to prove (as they might surely have done if such was the truth) that they were not absentees at the time the executory proceedings were taken.

III. That if the appointment by the judge of a representative to the opponents, as absentees, was necessary, this representative should have been an *attorney*, and not a *curator ad hoc*.

It is true that article 737 C. P. uses the word attorney, and its use in this case would have been desirable to save doubt, discussion and litigation; but the court will notice judicially who are its attorneys; and when we find that Henry Gibbon, Esq., was appointed *curator ad hoc* to represent the defendants, we may properly treat the phrase *curator ad hoc* as surplusage, and omitting it, notice that an attorney of the court was appointed to represent the defendants.

IV. That Mrs. Laurence and her husband were not served with three days' notice antecedent to the seizure.

The proper notice was served on Henry Gibbon, Esq., the attorney appointed to represent the defendants. It recites at length his appointment, and appears to make the proper demand.

V. That the three days' notice directed to the *curator ad hoc* should have been directed and addressed to the parties themselves, although served on him.

We have not been referred to any authority in support of this proposition, and we do not think it correct. Where citation is issued against an absentee it is properly addressed, not to the absentee but to the *curator ad hoc* in cases where a curator is properly appointed. 13 Ann. 405. *A fortiori* in this case, where the notice is not a citation, but practically a notice of judgment merely, we think the direction and address sufficient.

VI. That neither the parties nor the curator were notified of the postponement of the sale from the third November, 1866, to the fifth January, 1867, and to appoint an appraiser that day.

The record shows that on the fifth January, 1867, an appraiser was appointed by the plaintiffs and one by the *defendants*; that they were duly sworn, as well as the umpire who was afterward selected, and the defendants' appraiser agreed to the valuation made by the umpire. We thus find the defendants possessed of actual knowledge of the time of sale and taking part in its preliminaries. They cannot now say that they had no notice to appoint an appraiser; and as to a notice of a postponement of the sale; the re-advertisement, which in this case was formal and regular, furnished all required information on this point. 11 Ann. 64; 12 Ann. 839.

VII. That the writ had already expired at the time of the sale, and no copy thereof was retained by the sheriff.

The sheriff was not bound to return the writ as in cases provided for by act of 1855, No. 199. It is not a writ of *feri facias*. 18 An. 656. The fact that the clerk subjoined to it a direction to return it in seventy days did not deprive it of vitality after that time had expired. The direction by the clerk was *ultra vires*, and must be treated as mere surplusage.

VIII. That Mrs. Laurence never appointed and named the ap-

praiser, John Tarlton, neither did the sheriff on her failure, nor any other person authorized by her or by the court so to do.

As before remarked, the record satisfies us that the appraiser, Tarlton, was appointed by the defendants. The testimony of Tarlton does not rebut this. He says he was requested by Mr. H. E. Laurence to act as appraiser, and so told the sheriff. But he does not say he was not appointed by Mr. Gibbon, the attorney, or by Mrs. Laurence also.

For the reasons given, it is ordered and adjudged that the judgment of the District Court be affirmed with costs.

Mo. 721.—JAMES M. EDWARDS v. HENRY DUPUY.

Courts will not declare an act of the Legislature void unless its unconstitutionality is established beyond all reasonable doubt.

The act of the Legislature of 1869, No. 110, entitled "An act to amend and re-enact sections four and nine of an act entitled an act to organize the parish courts of this State," etc., is constitutional. The decision in the case of *Hawley v. Barlow* (ante page 563) re-affirmed.

APPEAL from the District Court, parish of Avoyelles. *Miller, J. Edwards & Ducote* for plaintiff and appellee, *Cullom & Walsh* for defendant and appellant.

LUDELING, C. J. The plaintiff, who is Judge of the Parish Court of the parish of Avoyelles, has enjoined the clerk of the District Court of said parish from performing the ministerial duties in the Parish Court, and from collecting the fees due for such services.

He avers that the act of the General Assembly approved March 9, 1869, which confers the rights and imposes the duties aforesaid, is contrary to the articles 86, 115 and 117 of the Constitution of this State.

There was judgment in favor of the plaintiff, perpetuating the injunction, and the defendant has appealed.

Article 86 of the Constitution declares that the parish judge "shall receive a salary and fees to be provided by law."

The act No. 110 provides that parish judges shall receive salaries, "and that they shall further be entitled to the fees which are now provided for clerks of courts in all cases of appeals from justices of the peace courts to the parish courts." Whether the General Assembly has properly exercised its discretion in this matter cannot be inquired into by us; it is sufficient to know that the General Assembly was not limited in the exercise of its discretion as to *what fees* should be allowed the parish judges.

The most which can be said in favor of the position assumed by the plaintiff, that the law is unconstitutional, is that it is not free from doubt. And courts will never declare a solemn act of the Legislature void unless its unconstitutionality is established beyond all reasonable doubt. Chief Justice Marshall said: "The question whether a law shall be void for its repugnancy to the Constitution, is at all times a

James M. Edwards v. Henry Dupuy.

question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. It is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." 6 Cranch 126, *Fletcher v. Peck*. In *Ogden v. Saunders*, 12 Wheaton p. 270, Mr. Justice Washington said: "But if I could rest my opinion in favor of the constitutionality of the law, on which the question arises, on no other ground than *this doubt* so felt and acknowledged, *that alone* would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to *presume* in favor of its validity, until its violation of the constitution is proved *beyond a reasonable doubt*."

The law in question is not repugnant to the article 115 of the Constitution. That article is similar to article 119 of the Constitution of 1845. The language of the article seems to lack precision, but it is obvious that the object of the provision of the constitution was to prevent the amendment or revival of laws *merely* by reference to their titles—the whole act *as amended* was re-enacted and published, and that was sufficient.

The act number 110 is not in opposition to article 117 of the Constitution; it does not create a new office. See *O. K. Hawley v. J. C. Barlow*, 21 An. 563.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, that the injunction be dissolved, and that the plaintiff and appellee pay the costs of both courts.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
AT
NEW ORLEANS.

NOVEMBER, 1869.

PRESENT:

HON. JOHN T. LUDELING,	<i>Chief Justice.</i>	
HON. J. G. TALIAFERRO,		}
HON. R. K. HOWELL,		
HON. W. G. WYLY,		
HON. W. W. HOWE,		
	<i>Associate Justices.</i>	

No. 1388.—POINDEXTER AND POLLARD, Appellees, v. JOHN E. KING,
Appellant.

A suit to recover on a contract of agency is prescribed by ten years. 15 An. 534; 16 An. 397;
17 An. 246.

When an agent, acting in the capacity of a commission merchant, has received produce on
consignment, with instructions from the shipper to sell the same for gold, he can not dis-
charge his liability to the principal by accounting for the net proceeds in a depreciated
currency of less value than that for which the property was sold, although that currency
be a legal tender dollar for dollar.

An account stated and acknowledged by the other party becomes a closed account, but it may
be re-examined afterward by either party for the purpose of correcting errors or supplying
omissions.

APPEAL from Sixth District Court, parish of Orleans. *Duplantier,*
J. Race, Foster & E. T. Merrick for plaintiffs and appellees.
Marr & Foute for defendant and appellant.

WYLY, J. In 1861, plaintiffs consigned to defendant seventy-four
hogsheads tobacco, which were sold by the latter for account of plain-
tiiffs in December, 1862, for \$14,338 36 in gold, and account current
thereof promptly rendered by defendant.

Polindexter and Pollard, Appellees, v. John E. King, Appellant.

During the year 1861 plaintiffs drew on defendant their several bills, amounting in the aggregate to \$8436 36, which defendant accepted and paid out of his own funds, and for which, with interest, plaintiffs became his debtor.

Immediately after the sale of the consignment, as aforesaid, the defendant paid over the cash balances in gold to Messrs. Watt, Given & Co., as requested by plaintiffs, to wit, \$4533 92.

On twenty-first September, 1863, plaintiffs wrote to the defendant, objecting to some of the items of the account, and stating, "now we claim that you owe us the premium the gold was then worth—

On amount of bills.....	\$8,436 36
On amount of commissions	210 90
On amount of interest balance.....	785 76
Total.....	\$9,433 02

Plaintiffs' petition alleges "the difference of value of gold and currency of the city at the date of said transaction was fully thirty per cent. in favor of gold, which on said sum of \$8436 36, and the interest charge of \$785 76, makes the full sum of \$2881 91, which, added to the \$210 90 erroneously charged for commissions, makes the sum of \$3092 81." To recover this \$3092 81 this suit has been instituted.

The court below gave judgment in favor of plaintiffs, and defendant has appealed.

Plaintiffs contend that their factor, John E. King, could not apply the gold proceeds of the tobacco to the extinguishment of his account against them for bills drawn on said consignment in 1861; that as their consignee he should have allowed them the premium of thirty per cent. in favor of gold in settlement of his said account, and that he should not have charged them two and a half per cent. commissions on the various bills drawn by them against their said consignment.

Plaintiffs contend that their factor paid these bills in currency, and in his account charged them as paid in gold, or applied their gold to the payment of his account.

There is no positive evidence in the record to establish the allegations of plaintiffs. The bills drawn by plaintiffs in 1861 could not have been paid in United States treasury notes, because they were not then in circulation in this city. The act authorizing issue of legal tender notes only passed twenty-fifth February, 1862. There is no allegation or proof that said bills were paid by the drawee, the defendant, in Confederate notes; and we can not presume that the parties before this court dealt in an unlawful currency.

It is true, the record shows that "the banks in New Orleans suspended specie payment on seventeenth September, 1861, excepting the Southern Bank." But it does not follow that defendant could not pay the various drafts of his consignors in lawful money without doing so through the banks.

It seems the various bills accepted and paid by defendant were given in part payment for the tobacco which plaintiffs had bought and shipped to him. Plaintiffs must have received a lawful consideration for the bills, and what difference was it to them how the drawee paid the payee thereof? The bills were made payable in dollars and not in any particular currency.

Now, if plaintiffs had desired to ascertain positively in what currency the bills were paid by the defendant, why did they not get the evidence of the payee of those bills, who could state positively how he was paid and in what currency?

Defendant occupied the position of factor toward the plaintiffs, and also the position of creditor for the amount of his individual funds advanced to pay plaintiffs' bills. What was the relation of the parties to each other on eighth December, 1862, the day the consignment of tobacco was sold? Plaintiffs were owing the defendant the amount of money he had advanced for them and interest thereon. They were not owing him the illegal charge of two and a half per cent. commissions on the bills drawn against the consignment in his hands. On the other hand, the defendant was owing the plaintiff the full amount of the net proceeds of the sale of tobacco.

At once, by operation of law, the entire indebtedness of plaintiffs to defendant became extinguished by compensation, and defendant was only owing the plaintiffs the balance due out of the proceeds of said consignment. Compensation only extinguished the amount of lawful indebtedness of plaintiffs to defendant in lawful money. Gold is lawful money of the United States; and an indebtedness in dollars can be compensated by a counter indebtedness in gold.

At the time the bills were drawn and delivered to the payee specie was the only legal tender of the United States. In the absence of positive evidence we must presume that the defendant paid those bills in lawful money, and plaintiffs became indebted to him from the time of the payment thereof.

We think, then, on eighth December, 1862, all debts, lawful claims, against plaintiffs became extinguished by compensation, and that defendant then occupied the relation of factor toward plaintiffs, owing them only for the balance of the proceeds of the tobacco. Defendant seems to have acted faithfully for his consignors; his sale seems to have given satisfaction, and he paid over the \$4533 92 in gold promptly to Messrs. Given, Watt & Co. at the request of plaintiffs. Indeed plaintiffs were very late in raising any objection to defendant's account current, rendered to them nearly nine months before.

We do not think the plea of usury, set up by defendant, applies to this case.

We regard this as an action of mandate, not prescribable in three years as an open account. Ten years is the only prescription against such a demand. 17 A. 246, and the authorities there cited.

Under the circumstances of the case, we believe that defendant is only indebted to plaintiffs \$210 90, the amount of the illegal charge made by him for commissions on plaintiffs' bills.

It is therefore ordered and decreed that the judgment of the court below be avoided and annulled, and proceeding now to give such judgment as the court should have rendered in this case, it is ordered, adjudged and decreed that plaintiffs have judgment against defendant for \$210 90 with five per cent. interest thereon from eighth December, 1862, and the cost of the court below, plaintiff to pay cost of this appeal.

Mr. Justice Taliaferro, dissenting :

I am unable to arrive at any other conclusion than that the defendant paid the Hoover drafts, amounting to \$5456 36, in what was called "currency." These drafts fell due on the twenty-ninth of January, 1862. All the facts in the record point to this conclusion as inevitable. Jacob Barker states that the banks in New Orleans suspended specie payments on the seventeenth September, 1861, except the Southern Bank. He states also that from the eighth to the fifteenth December, 1862, gold was forty per cent. premium for treasury notes; and that on the fourteenth February, 1862, gold was at thirty-seven and a half per cent. premium for treasury notes. It is in evidence that in December, 1862, business in New Orleans was mainly done in currency. (Record, p. 14.) The defendant in December, 1862, paid over by order of his principals to Given, Watt & Co. in gold \$4533 92. A member of that firm swears that for this payment in gold the firm credited the plaintiffs with \$5726, the amount they owed that firm. This is the same thing as paying the debt in "currency," for the defendant required them to receive \$4533 92 in gold, as equivalent to \$5726 in currency. I can not suppose that, having paid a debt of his principals in currency, after he had received the gold proceeds of the tobacco, he paid the Hoover drafts in gold or silver ten months before he had funds of any kind in hand belonging to his principals. He could not have paid these drafts in paper money of any kind which was of equal value with gold or silver, for there was at that time in this country no such paper money. Hedged around as he is by the evidence in the record, I think it illogical to deduce that the defendant paid these drafts in gold or in bank notes, convertible at will into specie, because it is not affirmatively shown that he made the payment in depreciated currency. On the contrary, all the facts in evidence raise a legitimate and very strong presumption against him, which must prevail in the absence of any proof tending to rebut that presumption.

Considering it then established that he did pay the two Hoover drafts in "currency" thirty-seven and a half per cent. below the value of gold, and that he charged the amount dollar for dollar against the gold proceeds of the tobacco, I think he ought to account to his principals for the premium on gold for "currency" at the time the payment was made, or rather the thirty per cent. premium claimed by the plaintiffs in their petition.

The relation that existed between the parties was clearly that of principal and agent or factor; standing in that relation, the primary duty of the defendant was strict fidelity to the interests of his principals and a proper regard of his legal obligation to restore to them all profits that may have arisen from, and to give to them the benefit of all advantages that may have grown out of their business entrusted to his care. Civil Code, article 2974; 10 Rob. 487.

I do not think the plea of prescription can avail the defendant. The claim simply of the gold premium can not be assimilated to an open account standing isolated from the business of the mandate. It springs from the transactions arising from the agency, and makes a part of them. It arises *ex-contractu*, and is not barred by the prescription of three years. C. C. article 3508; 15 An. 143 and 534; 16 An. 397; 17 An. 246. The plea of ratification, I think, should not prevail. True, some nine or ten months intervened between the time of the rendition of the account and the date of the letter of plaintiffs objecting to the account.

It is shown that intercourse between New Orleans and Clarksville was free in May, 1862. That the last named place was in possession of the Federal forces in 1862, and that it was not recaptured by the insurgents. This by no means establishes that there was any direct communication between the places during the whole period embracing the transactions. It appears that the communication was circuitous, being by the way of New York. A state of war existed in a considerable portion of the country through which this communication was had. It is not shown that the communication, such as it was, was safe, reliable and constantly free from suspension and delay. Under ordinary circumstances the plea might have weight, but under those that did exist, I am inclined to think none should be attached to it.

The plaintiff claiming equity should do equity. The first two bills drawn upon the defendant were paid by him before the suspension of specie payments; I think the inference clear that they were paid in specie or bank notes, convertible at that time into gold or silver at the will of the holder. The defendant should not therefore be held to account, so far as those bills are concerned, for any premium. The judgment, I think, erroneous in that respect, and should be reduced. The defendant is not protected by the doctrine announced in *Weaver v. Anjou* and subsequent decisions. The facts in this case are wholly

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different. In *Weaver v. Anfon*, the defendant was estopped by his haste to show that he had been dealing in an unlawful currency in derogation of law and morals, alleging his own turpitude to avoid his contracts. The check was paid either in Confederate money or in bank notes, and the court presumed the transaction to have been in lawful rather than in unlawful currency. This presumption in favor of the plaintiff in that case would *ceteris paribus* have availed the defendant in this case; but under the evidence it is swept away; for it is distinctly in proof that in the important payment made for his principal to Given, Watt & Co. he discharged the debt in currency, for he compelled his agent's creditor to receive gold with the high premium for it in payment of a debt contracted in 1860.

SAME CASE ON REHEARING.

LUDELING, C. J. The defendant is sued for an account of his agency in selling seventy-four hogsheads of tobacco shipped to him between the twenty-second of March and the first of May, 1861. The tobacco was sold in obedience to instructions, for coin, and it netted \$14,333 49 in gold, which was worth, at that date, and at the period when this suit was brought, \$18,794 26 in currency.

The plaintiffs drew several bills against their shipments of tobacco, amounting to \$8436 36, which the defendant accepted and paid.

The defendant rendered an account to the plaintiffs to which the plaintiffs urge the following objections:

That the charge of two and one-half per cent. commission for advancing, in addition to eight per cent. interest per annum, is unlawful and usurious.

That the bills drawn by the plaintiffs were paid in currency which was depreciated, and the amount thereof is charged up against the gold proceeds of the tobacco, and that the balance of interest is also charged up against said gold proceeds.

The defendant filed a general denial, and afterwards filed a supplemental answer, pleading the prescription of one and two years to the right of plaintiffs to object to the usurious charges in the account, and the prescription of three years against the demand of plaintiffs, which, it is alleged, is on an unacknowledged or open account.

The plea, as it respects the usurious interest, is without application. The plaintiffs have not paid any usurious interest—they are contesting the defendant's right to apply their money to the payment of unlawful interest claimed by him.

The prescription of three years is equally untenable. The suit is brought upon a contract of agency, and it is barred by ten and not three years. 7 An. 53; 10 R. 487; 15 An. 534; 16 An. 397; 17 An. 246.

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John E. King having made *advances* to Poindexter & Pollard on the shipments of tobacco to the amount of \$8436 36, the latter became the *debtors* of the former for that amount, and King had a privilege on the tobacco to secure the payment of the debt. If the tobacco had been destroyed, it would not be pretended that King could have recovered \$8436 36 *in gold* from his debtors—they could have discharged their liability in currency.

If the tobacco had been sold for United States treasury notes, King could have legally retained only \$8436 30 out of the proceeds. On what principle then can he be permitted to claim and retain \$11,248 48 *or its equivalent*, in payment of the \$8436 36 due him?

The shippers had a right to instruct their factor what to sell their property for; they told him they wanted *gold for the balance coming to them*. How could this fact change the rights of the defendant against the plaintiffs?

We cannot perceive why his debt should be paid in gold, if the tobacco were sold for gold, and in currency, if the tobacco were sold for currency. If the defendant had alleged and proved that he had been obliged to pay out gold for the plaintiffs, there might have been some equity in his demand, but such is not the fact. It is admitted that the banks suspended specie payment on the seventeenth day of September, 1861, and it is proved that after that period, the business in New Orleans (when the drafts of the plaintiffs were paid) was mainly carried on in currency. The Hoover drafts, due on the twenty-ninth of January, 1862, amount to \$5455; and that they, at least, were paid in a depreciated currency, the evidence in the record leaves no reasonable doubt. It is contended that the plaintiffs are estopped from claiming anything from defendant because they acquiesced in the account rendered to them by not objecting sooner. This question is not presented by the pleadings. But if it had been it would not have prevented the plaintiffs from showing errors in the account. The effect resulting from an acknowledgment of the account would be to shift the onus of proof. "These accounts are necessarily provisional until settled, and even after settlement, may be rectified by either party on account of errors or omissions, subject to which every settlement is held to be made." 2 An. 27.

The defendant is bound to account to his principals for the balance of the gold receipts. The agent cannot be allowed to enrich himself at the expense of his principal.

It is therefore ordered, adjudged and decreed that the judgment of this court rendered on the thirtieth November, 1868, be avoided and reversed, and that the judgment of the District Court be amended so as to reduce the amount of the judgment of the District Court in favor of the plaintiffs to the sum of two thousand nine hundred and seventy-seven dollars and fifty-four cents, and that the judgment thus amended be affirmed, and that the appellees pay the costs of this appeal.

WYLY, J. I still adhere to the views expressed in the original decision of this case.

The drafts were drawn on the consignment and paid by the defendant before the issue of the United States currency, and in the absence of proof to the contrary, the presumption is inevitable that they were paid in lawful money, gold or silver, which was then the only legal tender. I cannot presume—indeed the plaintiffs have not alleged—that the defendant paid their drafts in Confederate notes; parties will not be presumed to have dealt in an unlawful currency when it has neither been alleged nor proved. If the agent has paid gold on the consignment, and we can presume nothing else, he is entitled to recover the same from his principal, whether the consignment be destroyed or be sold, under the directions of the latter, for United States currency or gold. It matters not that the tobacco could have been sold on eighth December, 1862, for either gold or United States currency (the latter being then in circulation). The drafts were drawn in 1861, and they were paid before the act was passed authorizing the issue of United States currency; they could not have been lawfully discharged or paid except in gold or silver. And the principal was bound to return an equal value to his agent.

The account was rendered by the defendant to the plaintiffs nearly nine months before any objection was made. In that account he imputed a sufficient amount of the gold proceeds to the payment of the amount of his advances. The account of sales was in gold, the amount of advances was deducted therefrom, dollar for dollar, in the account. After the lapse of so long a time, without objection, it ceased to be an open account, and became a stated account between the parties.

Now, if plaintiffs seek to go behind that account or settlement, and claim that their factor has been unfaithful; that, instead of paying the drafts which they drew on him in 1861, in gold or silver (the only lawful money), he in fact discharged the same in Confederate notes, of less value, they must allege and prove the infidelity of the agent; they must make out their case; they cannot establish it upon presumptions that are unlawful, and therefore impossible.

If the relation of defendant and plaintiffs be only that of debtor and creditor, and therefore the debt of the latter could have been discharged on eighth December, 1862, in United States currency, dollar for dollar, the defendant could compensate his debt with the gold of plaintiff which happened to be in his hands, dollar for dollar.

For the foregoing reasons and those assigned in the original opinion of this court, I cannot assent to the decision just rendered.

No. 1746.—ANATOLE COUSIN v. ABAT, GENERES & CO.

Abat, Generes & Co., commission merchants in the city of New Orleans, received, in 1862, of Anatole Cousin, a customer of theirs, the sum of \$16,715 in notes of the so-called Confederate States, to be invested in city bonds and notes secured by mortgage. The notes were invested in bonds of the city, known as Defense Bonds, which were redeemable in the same kind of currency. Cousin brings suit for the amount thus delivered. Held—That the entire transaction being in Confederate notes was illegal and null. 19 An. 161, 288, 359; Constitution of 1868, article 127.

The organization known as the Confederate States never reached the dignity of a *de facto* government. Stewart v. Smith, *ante* page 67.

The order of Major General Butler compelling the holders of City Defense Bonds to pay a certain per cent. thereof for the benefit of the poor of New Orleans, was punitive, and no action lies to recover the amount of such assessment.

APPEAL from the Second District Court of New Orleans. *Thomas, J. J. Ad. Rozier*, for plaintiff and appellant. *Cyprien Dufour*, for defendants and appellees.

HOWE, J. The evidence in this case satisfies us that the plaintiff delivered to the defendants' firm a sum of Confederate money to be invested; and the latter invested it, with the exception of a small portion, tendered in court, in bonds of the city of New Orleans payable in the same currency.

Under such circumstances, we are of opinion that the court *a quo* properly rejected the demand of the plaintiff. Hunly v. Scott, 19 An. 161; King v. Huston, 19 An. 288; McCracken v. Poole, 19 An. 359; Norton v. Dawson, 19 An. 464.

The plaintiff, appellant, has filed in this court an assignment of errors, in which he alleges that the proceedings and judgment of the lower court are manifestly erroneous in this, that the one hundred and twenty-seventh article of the Constitution of 1868 is repugnant to article 1, section 10 of the Constitution of the United States, which forbids the passage by a State of a law impairing the obligation of contracts. We presume this assignment was made through inadvertence. The judgment appealed from was rendered in July, 1867, before the Constitution of 1868 was framed, and long before it was adopted.

The other points raised by the appellant, that the Confederate States were a government *de facto*, and that obligations like those in suit in this case, founded on the use and circulation of Confederate treasury notes, should be enforced by our courts, have already been settled adversely to his views by numerous decisions. See Smith v. Stewart, 21 An. page 67, and the cases above cited. We think the subject is one to which the rule of *stare decisis* is justly applicable, and we must therefore decline to reopen the controversy.

We are of opinion that the judge *a quo* did not err in dismissing the reconventional demand of the defendants. They were compelled by Major General Butler to pay for the support of the poor of New Orleans a certain per centage upon the amount of "City Defense Bonds" to which they had subscribed. They claim to have thus paid \$4000

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for account of the plaintiff, upon the sixteen bonds for \$1000 each, in which they had invested his Confederate notes. We apprehend that the action of the commanding general was punitory, and that the payment by defendants in expiation of an offense, cannot give them any claim against the plaintiff.

For the reasons given it is ordered and adjudged that the judgment appealed from be affirmed with costs.

Rehearing refused.

No. 1730.—DEGELOS, DURRIVE & Co. v. EMILY WOOLFOLK.

Where a commercial firm has obtained judgment against a debtor, and the firm is afterwards dissolved by the death of two of the partners, and the survivor forms a new partnership with two other parties, and judgment is obtained against the new firm, on which execution issues, only the interest of the surviving partner in the judgment in favor of the old firm can be reached by seizure. The other interests in such judgment belong to the heirs or creditors of the deceased partners, and cannot be made liable for the debts of the new firm. The plea of *res judicata* will not be maintained unless the parties to the first judgment are the same as those of the second.

A PPEAL from the Second District Court of New Orleans. *Thomas, J. Elmore & King, Alfred Shaw, and Simonds & Gayarre* for appellants. *P. H. Morgan* for appellees.

TALIAFERRO, J. The conflicting claims of various creditors for the proceeds of the property of their debtor, sold under executions, form the subject of this litigation.

The case is brought before us from the Second District Court of New Orleans on appeal from a judgment on a rule taken by the administrator of Mill on Sheriff Hays to show cause why he should not pay over to him two thousand and fifty-six dollars, with costs, out of the funds in his hands collected in the suit of *E. Durrive v. Emily Woolfolk*. The rule was made absolute. Shaw, a predecessor of Hays in the sheriffalty, and two of the contestants, Lanata and Mrs. Gayarre, have appealed.

Edward Durrive, as liquidator of the firm of Degelos, Durrive & Co., obtained a judgment in May, 1858, against the defendant, Mrs. Woolfolk, for about eight thousand dollars, with interest.

In 1864, Hernandez, a creditor of the defendant, brought suit against her on his claims, and attached fifty bales of her cotton.

Subsequently to the attachment of Hernandez, Durrive, the liquidator, seized the same cotton under *f. fa.* issued on his judgment, and the sheriff, proceeding under this writ and also under one issued in the suit of Hernandez, sold the cotton, and by consent of parties, retained the money in his possession subject to the final decree of court.

The suit of Hernandez was instituted in the Sixth District Court of New Orleans. Durrive, liquidator, intervened in that suit, and moved that the funds in the hands of the sheriff be paid to him in

preference to Hernandez. The court decided in favor of Hernandez. The liquidator appealed, and this Court reversed the decision on the ground that the attachment was illegally taken out by Hernandez. This disposed of his claim, and he disappeared from the contest.

Mrs. Gayarre had obtained a judgment in the Fourth District Court against E. Durrive & Co., and issued execution upon it. The same funds were seized under this writ. Victor Rommage had obtained a judgment against E. Durrive & Co. in the Third District Court, and he also seized, under *fi. fa.*, the money in controversy in the hands of the sheriff. He took a rule upon the sheriff to show cause why he should not pay the funds to him. Mrs. Gayarre intervened by third opposition, claiming to be paid by preference. Mrs. Rosalie Harris, wife of E. Durrive, junior, also intervened and claimed the funds.

P. H. Morgan, as the attorney of E. Durrive & Co., appeared and moved the transfer of the cause to the Second District Court. This motion was overruled. The court ordered that the sheriff pay over all the funds in his hands to Mrs. Gayarre after paying to P. H. Morgan three hundred dollars for professional services rendered the liquidator. The administrator of Rommage was the only one of the parties who appealed. His appeal was dismissed.

Here the scene changed to the Second District Court. The counsel for Michel Hebert, administrator of the estate of Thomas Mill, formerly a partner of the house of Degelos, Durrive & Co., had, as we have before seen, taken rule on the sheriff to show cause why he should not pay to the administrator of Mill's estate two thousand and fifty-six dollars and costs. A new contestant entered the list. Dominique Lanata intervened and claimed the money in the sheriff's hands. Soon after Mrs. Gayarre appeared and excepted to the proceedings on the ground that the Third District Court had rendered a judgment in her favor, ordering the sheriff to pay over to her the funds in his hands; that she had issued execution on that judgment; that it could not be interfered with, nor the execution stayed except by injunction taken out under oath and by giving security according to law. This exception was overruled. The Court awarded to Mrs. Gayarre one-third of the funds seized, and two-thirds to the heirs of Mill.

The three appellants from this judgment are the sheriff Shaw, Lanata and Mrs. Gayarre. The sheriff and Mrs. Gayarre set up in this Court the plea of *res judicata*.

The opponent Lanata alleges that the proceeds of the sale of cotton, seized by Durrive, liquidator, belong to him in right of his seizure of the funds under *fi. fa.* issued on his judgment against Mrs. Emily Woolfolk, for the reason that the judgment of Degelos, Durrive & Co. against Mrs. Woolfolk had become extinct by novation. He averred that the liquidating partner of the firm of Degelos, Durrive & Co. had received, in payment of the judgment, the acceptances of

Messrs. Fellowes & Co. by an arrangement with that house, and that the original debt of Mrs. Woolfolk to Degelos, Durrive & Co. did not exist when the liquidating partner issued execution on the judgment and seized the fifty bales of cotton.

These allegations of Lanata are not sustained by the evidence. Durrive, the liquidator, and Judge Labauve, who testified in the case as witnesses, state that, by the arrangement, the liquidator of the partnership was not to subrogate Fellowes & Co. to the judgment against Mrs. Woolfolk until the acceptances were fully paid. Judge Labauve, who was counsel for one of the parties, drew up the agreement, and he states that it was expressly understood, and so reduced to writing, that no novation was to take place. It seems that eight hundred dollars were paid by Fellowes & Co., and nothing beyond that; and it does not appear that they have ever claimed any right in the judgment.

It is in proof that the original firm of Degelos, Durrive & Co. was dissolved by the death of Degelos and Mill, and took place in 1856 or 1857. Subsequently, a new firm was established, composed of Edward Durrive, senior, F. Durrive, and Edward Durrive, junior. The style of this firm was E. Durrive & Co. The firm of Degelos, Durrive & Co. was composed of Edward Durrive, senior, Degelos and Mill—Edward Durrive being the only one of the original firm who became a partner in the new firm. It appears that the judgment of Mrs. Gayarre was obtained against the firm of E. Durrive & Co., and not against the firm of Degelos, Durrive & Co. It results, then, that her seizure could only reach the share and interest that Edward Durrive had in the original judgment of Degelos, Durrive & Co. against Mrs. Woolfolk, from having been a partner of that firm. That interest was a third. The other two-thirds were consolidated and were owned by Mill.

The plea of *res judicata* cannot avail the opponents who set it up. The parties were not the same. In the Third District Court, which directed all the proceeds of the cotton to be paid over to Morgan and Mrs. Gayarre, the administrator of Mill did not appear, nor was he cited. P. H. Morgan appeared as counsel of E. Durrive & Co. Two-thirds of the money belonged to Mill's estate. Mrs. Gayarre's judgment was against E. Durrive & Co. She was not the creditor of the firm of Degelos, Durrive & Co. The estate of Mill owed her nothing. She could not, by alleging that the funds belonged to E. Durrive & Co., her debtors, grasp more than the one-third of the funds, and that by reason of one of that firm owning a third interest of the debt of Mrs. Woolfolk to Degelos, Durrive & Co.

We think the controversy was properly settled by the court below, and that justice has been done between the parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

Heirs of J. W. Wilder v. Henry C. Petty.

No. 1810.—HEIRS OF J. W. WILDER v. HENRY C. PETTY.

H. C. Petty and the heirs of Wilder held property in common, on which a mortgage existed in favor of the Citizens' Bank. The heirs brought suit and obtained a partition in kind, which was executed before a notary public. The heirs then, through their tutrix, having obtained the consent of the bank, moved for a division of the encumbrance, and obtained the permission to sign the necessary stock note in favor of the bank. The tutrix afterwards refused to sign the note. Held—That she was properly compelled by judgment, on rule, to sign the note, and that evidence was inadmissible, on trial of the rule, to show the condition of a partnership which had existed between their ancestor, Wilder, and the defendant, Petty, of which Petty was liquidator.

APPEAL from the Second District Court of New Orleans. *Thomas, J. Race, Foster & E. T. Merrick*, for plaintiffs and appellants. *T. A. Bartlette*, for defendant and appellee.

HOWE, J. The plaintiffs sued the defendant for the partition of certain real property held by them in common. Judgment was rendered that the property be divided in kind, and a partition was accordingly made before a notary, and as the defendant drew the more valuable portion, he paid to plaintiffs, in cash, a sum sufficient to equalize the shares, and an act was duly signed and homologated.

A mortgage rested on the whole property in favor of the Citizens' Bank to secure a note given for a loan, and renewable, according to the charter, upon stock of the bank. It seems that the bank consented that this debt should be divided; and, upon her own motion, the tutrix obtained permission to sign the necessary stock note. For some reason, which is not apparent, she afterwards declined to sign the acts necessary to divide the debt, and the defendant, Petty, took a rule to compel the signature. The rule was made absolute, and the plaintiff in the suit appealed.

Upon the trial of the rule the plaintiffs, defendants on rule, reserved a bill of exceptions to the exclusion by the judge of testimony offered by them in reference to the condition of the partnership which had existed between the decedent, Wilder, and the defendant, Petty, of which Petty was liquidator. The judge did not err in this ruling, as the property partitioned did not appear to form any part of the partnership assets.

Nor do we perceive any error in the judgment on the merits of the rule. The division of the encumbrance appears to be, in this case, at least, a natural and just sequel to the partition in kind, provoked by the appellants themselves, and necessary to complete it in such manner as to fully secure the rights of the minors as well as those of the defendant.

It is therefore ordered that the judgment appealed from be affirmed with costs.

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**No. 2250.—THE STATE OF LOUISIANA on information and relation of
GEORGE M. WICKLIFFE v. L. T. DELASSIZE.**

An action against a party for usurping, intruding into or unlawfully holding or exercising a public office in the parish of Orleans must be brought by the Attorney General in the name of the State. Act No. 156, § 2, of 1863.

A PPEAL from the Seventh District Court for the parish of Orleans. *Collens, J. Semmes & Mott*, for plaintiff and appellant. *W. H. Hunt*, for defendant and appellee.

HOWE, J. This suit was instituted under the act No. 156, approved October 15, 1863 "providing a remedy against usurpations of or intrusions into or the unlawful holding or exercising a public office or franchise in this State." The relator, averring himself to be the Auditor of Public Accounts, alleged that the defendant had usurped and intruded into that office, and prayed that the latter might be excluded therefrom, and that the relator's right thereto might be recognized and adjudged in his favor.

The defendant excepted to this petition on the ground that the same was not filed by the Attorney General or by any other person authorized to institute the suit. The court sustained the exception and dismissed the suit, and the relator has appealed.

By act No. 58 of the Legislature, approved September 8, 1863, it was provided as follows:

"SECTION 1. That an action by petition may be brought before the proper District Court by the Attorney General, in the name of the State, upon his own information and upon the complaint of any private party, against the persons or parties offending, in the following cases:

"*First*—When any person shall usurp, intrude into, or unlawfully hold, or exercise, any public office or franchise within this State; or,

"*Second*—When any public officer shall have done or suffered an act, or which by the provisions of law shall work a forfeiture of his office; or

"*Third*—When any association or number of persons shall act within this State as a corporation without being duly incorporated.

"SEC. 2. That in all such cases, when made known to the Attorney General, it is hereby made his duty to so bring action against the offending party."

* * * * *

"SEC. 4. That where an action shall be brought by the Attorney General by virtue of this law, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the people as plaintiff."

* * * * *

The act No. 156, under which this action is brought amends and reenacts the preceding, so that the first and second sections read as follows:

"SECTION 1. * * That an action by petition may be brought before the proper District Court or Parish Court, by the District Attorney or District Attorney *pro tempore*; and, for the parish of Orleans, by the Attorney General, or any other person interested, in the name

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of the State, upon his own information or upon the information of any private party against the party or parties offending, in the following cases:"

"SEC. 2. That, in the cases mentioned in the foregoing section, it is hereby made the duty of the District Attorney or the District Attorney *pro tempore* of the parish in which the case arises, and for the parish of Orleans by the Attorney General, to bring action against the offending party or parties, when so required to do."

The third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh sections are substantially the same in the amendatory as in the original act. They provide that where the action is instituted by the Attorney General on the information of the person interested, the name of such person shall be joined with the State as plaintiff; that in an action brought upon the state of facts alleged in the case at bar, the name of the party rightfully entitled to the office may also be set forth, and to secure him the fees, etc., the defendant may be arrested; that if the judgment be against the defendant and in favor of the person alleged to be entitled, the latter may take upon himself the execution of the office and demand the books and papers; that the defendant may be prosecuted in criminal proceedings for refusing to comply with such demand, and that the person so adjudged to be entitled, may, by action, recover the damages sustained by reason of the usurpation.

The cases provided for are the same in both acts, and so far as the first class is concerned—the usurpation of and intrusion into a public office—we agree with the judge *a quo* that the latter act does not authorize the institution of the suit at bar. It may be that its first section, read alone, might sustain the proceeding, though it would be difficult then to conjecture why the Legislature should authorize any person interested in the parish of Orleans to bring the suit, and exclude the people of the rest of the State, when interested, from such a privilege. But the law, as a whole, appears to have amended and reenacted the act No. 58, principally for the purposes of including parish courts as the tribunals, in proper cases, if any there can be; of imposing the duty of bringing the action on District Attorneys in country parishes, and finally of making it imperative on the Attorney General and the District Attorneys to bring such actions "when so required to do." The phrase "when so required to do," in the second section, evidently relates back to the first section, and alludes to some requirement by the "other person interested." The remaining portion of the act No. 58, as we have seen, is practically unchanged, and plainly contemplates, not that the person interested shall bring the suit in the name of the State, but that his name shall be joined as plaintiff in a suit brought by the State through its proper officer. Such an interpretation seems to be the one which is most consistent with the tenor of the law, with the statutory and constitutional definitions of the

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duties of the law officers of the State, and with the general principles which underlie the action in the nature of *quo warranto*.

It is therefore ordered and adjudged that the judgment appealed from be affirmed with costs.

No. 1633.—SUCCESSION OF CHARLES SCHÜTTLER.

The executrix and tutrix, having interests in common with the major and minor heirs, are incompetent to represent the minors in a judicial partition.

Proceedings in partition, where the tutrix has represented the minors without the advice of a family meeting, are null, and the purchaser of property at a sale made under such circumstances cannot be compelled to pay the price bid.

APPEAL from the Second District Court of New Orleans—*Thomas, J. F. Fuselier* for appellant. *Budd & Grover* and *Frank Haynes* for appellees.

TALIAFERRO, J. The defendants in rule, Ryan and Lacey, having purchased real estate of the succession of Schüttler, at a probate sale made in the year 1837, declined paying the amount of their bids. A rule was filed against them by the executrix of Schüttler to show cause why they should not be required to comply with the terms of the sale; or failing therein, why the property purchased by them should not be sold at their *folle enchere*, and at their risk. They answered separately, but the grounds of defense were substantially the same, except that Lacey averred that the title to the property purchased by him was defective, for the reason that Schüttler bought it at a probate sale of Weber's estate, in which minor heirs were interested, and that the legal proceedings to divest the interest of the minors had not been observed. The defendants averred that the proceedings in the succession of Schüttler, under which the sale and adjudication were made, were also defective and null, and that the adjudication passed no title to the purchasers. They allege that the steps taken by the executrix to obtain the order under which the sale was made, were irregular and illegal, the object being a disguised partition; and not having observed the formalities required in proceedings to effect a judicial partition, nullity ensued.

Judgment was rendered in the court below in favor of the defendants, and the executrix has prosecuted this appeal.

The executrix of Schüttler is his widow and the mother of his six children, three of whom are of the age of majority and three are minors. The executrix is also tutrix of the minors. The domicile of these parties is in the parish of Avoyelles, in this State. The real property of the succession is situated in New Orleans. The proceedings seem to have been carried on partly before the Second District Court of New Orleans and partly before the District Court of the Seventh Judicial District sitting for the parish of Avoyelles.

Succession of Charles Schuttler.

In June, 1867, the executrix filed a provisional account, in which the debts of the succession were set down, and the amount of the assets. The debts deducted, a remaining balance of eight hundred and twenty-four dollars and forty-seven cents was distributed. This account was duly homologated in the month of July. The executrix filed a petition in the Second District Court on the twenty-fifth of June, 1867, setting forth that the major heirs had become clamorous for a full and final settlement of the succession; and to effect that purpose, she prayed that the real estate in New Orleans be sold for cash for her half interest, and also for the interests of the major heirs, but on a credit of one, two and three years, with mortgage, for the minors' share. Pending the action of the court on this application, proceedings were taken in Avoyelles to procure the consent of a family meeting to the sale, and obtain the terms upon which the minors' interest in the real estate should be sold. These proceedings being exhibited to the Second District Court, it rendered the order prayed for, and after the legal delays, the property was sold.

It is clear from the entire course pursued in this case, that a partition of the succession was the actuating motive of the executrix and the major heirs. There was else no necessity for a sale of the remaining property of the estate after the debts were paid, and a partial division made by the provisional account. The interests of the executrix and tutrix were in conflict with those of the minors, and she was incompetent, in a judicial partition, to represent them. As a proceeding in partition, and we can take no other view of it, it was null for the want of proper parties. In regard to the additional ground of defense set up by Lacey, it seems well founded. The particular property adjudicated to Lacey was acquired, as already said, from the succession of Weber at a probate sale made at the instance of a tutor without the authority or advice of a family meeting. This Court pronounced the nullity of that sale in the matter of the succession of Mrs. J. G. Weber. 16 An. p. 420.

We concur with the Judge *a quo* in the judgment rendered by him. Civil Code, article 1291; C. P. 116, 1020; 5 An. 208; 14 An. 154; 15 An. 251.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

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No. 1518.—JOSEPH WESTERMEIER v. HENRY STREET.

Where a judgment in reconvention has been appealed from by the plaintiff, the judgment in his favor cannot be revised or amended on the answer of the appellee to the appeal.

To enable the lessee to recover damages in consequence of the failure of the lessor to deliver the premises leased at the date of the written lease, he must show that he has put the lessor in default.

The lessee, after notifying the lessor that the premises are in a leaky condition, may, if the lessor refuse, cause them to be repaired so that they will be tenantable, and deduct the expense of repairs from the rent.

A PPEAL from the Fourth District Court of New Orleans—*Theard, J.* *T. J. Earhart* and *E. W. Huntington* for plaintiff and appellant. *Hornor & Benedict* for defendant and appellee.

HOWELL, J. This is a suit for the recovery of rent due and for the dissolution of the lease because of the failure to pay the rent, the defense to which is the general denial, with a demand in reconvention for damages caused, it is alleged, by the plaintiff's failure to deliver possession of the premises at the date stipulated, by delivering them in a leaky and otherwise untenable condition, and by the illegal and malicious issuance and execution of the writ of provisional seizure.

Pending the trial in the court *a qua*, the plaintiff discontinued his demand for the dissolution of the lease, without prejudice to defendant's reconventional demand.

Judgment was rendered in favor of the plaintiff for the rent claimed, with five per cent. interest from the date of filing his petition, and lessor's privilege on the property seized, and in favor of the defendant on his demand for five hundred dollars with interest from judicial demand, the plaintiff to pay all costs of suit.

From the judgment against him for five hundred dollars damages, the plaintiff has appealed; and in answer to the appeal the defendant has prayed that the judgment of the lower Court be amended by striking out all that portion in favor of the plaintiff and by allowing defendant the whole amount of damages (five thousand dollars) claimed by him.

The judgment in favor of plaintiff has not been appealed from, and cannot be revised on the answer of the appellee.

As to the damages in the loss of business and the wages of employes, alleged to have been sustained in consequence of plaintiff's failure to deliver the premises at the date stipulated in the written lease, the defendant has neither alleged nor proven that he put the plaintiff in default. And besides, conceding that a lessor may be held liable for such damages, he has waived them by taking possession of the premises and paying rent without objection. The last and the further reason, that the lessee could have had the premises repaired on the lessor's refusal to do so, and have deducted the cost thereof from the rent, will not authorize him, under the evidence, to recover damages alleged to have resulted from the delivery of the premises to the lessee in a leaky

Joseph Westermeler v. Henry Street.

and otherwise untenable condition. And as to the third item of damages, there is nothing in the record to show that the issuance of the writ of provisional seizure was illegal and malicious. On the contrary, it was authorized by law and sustained by the judgment of the Court *a qua*. But there was error in allowing damages and making plaintiff pay costs.

It is, therefore, ordered, that the judgment appealed from, which allows damages on defendant's reconventional demand, be reversed, and that there be judgment thereon in favor of plaintiff, with costs in both courts.

No. 2012.—SUCCESSION OF WIDOW THEODORE ZERINGUE.

The action for a separation of patrimony is prescribed against in three months from the date of acceptance of the succession by the heir. C. C. 1409. If a creditor fails to bring suit for, or demand a separation of patrimony from the heir for more than three months after acceptance of the succession, his debt becomes a personal one against the heir, and will rank inferior to a mortgage debt which the heir has created on the property.

APPEAL from the Second District Court, parish of Orleans—*Duvigneaud, J. James D. Augustine and H. Dugue* for appellants. *C. E. Schmidt* for Mrs. Steph, opponent and appellee.

WYLY, J. This is an opposition to an administrator's account, and contest between creditors for preference in the funds in the hands of the administrator.

Widow Zeringue inherited a house and lot and some slaves from her mother, Mrs. St. Amand, who died in 1861, being her sole surviving heiress.

She lived in the house with her mother; and after her death, she continued to occupy her property and collect the hire of her slaves without administering.

The slaves having ceased to be property, she became anxious to raise some money on the house and lot, and in order to give confidence in her title, she made formal application to the probate court on thirtieth December, 1863, to be recognized as sole surviving heir, and to be put in possession of the property, which was done. On twenty-ninth February, 1864 (within three months thereafter), she borrowed from Widow J. Steph eleven hundred and ten dollars, and gave her note therefor secured by special mortgage on the house and lot, the mortgage certificate showing there were no prior mortgages on the property given either by Mrs. Zeringue or her mother, Widow St. Amand.

Widow Theodore Zeringue afterwards died, and H. F. M. Fortier was appointed administrator of her estate. He caused the house and lot in this city (the only remaining property) to be sold to pay debts; and filed his account, showing, after the payment of court charges and privilege claims, a balance of two thousand and fourteen dollars

Succession of Widow Theodore Zeringue.

and eighty-eight cents, proceeds of sale, which he allowed in his account to be applied to a claim which he alleged was due from Widow St. Amand to the minors Guillotte, issue of his wife by a former marriage with William Guillotte, deceased, and represented by Mrs. Fortier, his wife, as natural tutrix.

Widow J. Steph, the holder of the note for eleven hundred and ten dollars secured by special mortgage on the property sold, filed an opposition to the account, alleging that she had not been put on the tableau, and that the administrator ignored her claim, although she held the first mortgage, and that she was entitled above all other creditors to the funds in the hands of the administrator.

Mrs. Fortier, as tutrix of her minor children, issue of her marriage with William Guillotte, deceased, filed also an opposition, alleging that although her claim, in behalf of said minors, was correctly put down on the tableau for the amount of the principal, with its proper rank and privilege on the proceeds of the property sold, still the administrator had failed to allow the interest on said debt, which is equally due by preference. She further alleges that, on or about the fourteenth April, 1860, prior to her second marriage, she loaned a sum of money to Widow J. B. St. Amand out of the funds in her hands as tutrix of her minor children, taking her note drawn to her own order and indorsed for the amount. That after the death of Widow St. Amand, Widow Zeringue often acknowledged the debt as due by the estate of her deceased mother, and promised to sell property and pay it; but that notwithstanding these repeated promises, she caused herself to be put in possession of the succession of her mother, the said widow St. Amand, as her sole heiress, and then illegally granted a mortgage on the house and lot, the only property of the estate, to secure the debt to Widow J. Steph, created by herself since her mother's death. She claims that, as creditor of Widow St. Amand, she should be paid out of the proceeds of the property of the latter in preference to the creditors of Widow Zeringue. She admits, however, that she took a mortgage and the individual note of said Widow Zeringue for the debt contracted by her mother, Widow St. Amand, and gave up the original note to her; but avers that she did so without the authorization of her husband or of the court, and that she did not intend to novate the debt, nor to relinquish her right to contest the mortgage to Widow J. Steph. She prayed that the mortgage granted by Widow Zeringue to Mrs. J. Steph be declared null and void, or that the same be put down on the administrator's tableau only ranking after her claims in behalf of her said minors.

Widow J. Steph, in bar of the demand of Mrs. Fortier, as tutrix, to have her alleged debt decreed entitled to a preference over the personal creditors of Widow T. Zeringue, pleaded the prescription of three months in conformity with article 1409 C. C., averring that said

Succession of Widow Theodore Zeringue.

tutrix had failed to demand a separation of patrimony within three months from either the express or tacit acceptance by Widow Zeringue of her mother's succession. She also averred that the alleged debt, due by Widow St. Amand to said tutrix, was novated by the mortgage and note of Mrs. Zeringue given in lieu thereof.

The Court sustained the opposition of Widow J. Steph, and ordered that the account of the administrator be so amended as to place her claim thereon, to be paid by preference out of the proceeds to be distributed; and that the claim of Mrs. Fortier as tutrix be placed next in rank on the tableau.

From that judgment Mrs. Fortier, as tutrix, and her husband, as administrator, have appealed.

The question is, has the creditor of Mrs. St. Amand a preference on the proceeds of the sale of the property inherited, possessed and controlled by her daughter for so many years without administering, over the personal creditors of the latter?

By article 1370 of the Civil Code, "Creditors have three kinds of action to cause themselves to be paid the debts due them by the deceased, viz:

"1. A personal action against the heirs or those who stand in the place of heirs;

"2. A hypothecary action against the detainers or possessors of the property mortgaged for their debts;

"3. And the action for the separation of the patrimony of the deceased from that of the heir."

By article 1409, "The suit for separation of patrimony must be instituted within three months from the express or tacit acceptance by the heirs. After the expiration of this term it is not admitted."

The evidence in the record satisfies us that Widow Zeringue occupied and controlled, in her own right, the property which she inherited from her mother from the death of the latter in 1861, and that this was a tacit acceptance of the succession. 19 An. 60. Mrs. Fortier, tutrix, was fully aware thereof, because for several years she rented rooms or boarded at her house. We do not find in the record that any suit was ever instituted for a separation of patrimony, although seven years had elapsed since Widow Zeringue began the occupancy and control of the property which she inherited from her mother, Mrs. St. Amand. We do not see what difference it makes whether Mrs. Zeringue assumed the ownership of the property by her tacit acceptance in 1861, or by her formal express acceptance in 1863, as Mrs. Fortier, tutrix, has not instituted suit for the separation of patrimony within three months of either of the acceptances; indeed, there is not in this proceeding any legal demand for the separation of patrimony, because we find no compliance with article 1410 C. C., which says: "The petition for separation of patrimony shall not be received unless it be

accompanied with the sworn declaration of the creditor or creditors that they believe that the heir is embarrassed with debts, and that they have reason to believe that his personal debts will absorb the effects of the succession to their prejudice."

Mrs. Fortier, tutrix, without even attempting to cause herself to be paid by proceeding under article 1370 C. C., now seeks to have the mortgage of Mrs. J. Steph declared null as done in fraud of her rights, when in fact she has never attempted to assert any rights against the succession of Mrs. St. Amand. The fact that Mrs. Zeringue mortgaged the property to Mrs. J. Steph within three months after the formal acceptance in 1863, does not now give Mrs. Fortier, tutrix, the right to have the same declared null as done in fraud of her rights.

Article 1411 C. C. must be construed in reference to article 1409 C. C. The latter article limits the period for the action of separation of patrimony to three months, and says: "After the expiration of this term it is not admitted." Article 1411 C. C. provides that within this term the heir cannot alienate or mortgage the property to the prejudice of the creditors, and if he does they may cause the act to be declared null as done in fraud of their rights.

If they do not assert their rights within the three months, they lose them as against the succession; and their only remedy then is a personal action against the heirs, or those who stand in place of the heirs. C. C. 1770.

We understand article 1411 C. C. to prevent the heir from alienating or mortgaging the property to the prejudice of the rights of the creditors, and if so, to have it declared null. It does not render absolutely null the mortgage given within the three months; it only does so when the same is prejudicial to the rights of the creditors. What right of the creditors? The right within three months to an action for separation of patrimony. C. C. 1409. If a creditor has lost his right by failing to exercise it within the period limited by law, how can a mortgage or sale of the property by the heir affect him? How can it prejudice rights which he has lost? How can we say that the mortgage of Mrs. J. Steph prejudices the right of Mrs. Fortier, tutrix, to have the property of Mrs. J. B. St. Amand separated from that of her heir so as to have a preference thereon over the personal creditors of the heir, when she has failed to assert that right in the time and manner provided by law? She has lost her right, and the mortgage cannot be said to be prejudicial to a right which has already ceased to exist.

The defense to the prescription of three months, that the same cannot run against the minor heirs represented by Mrs. Fortier, is not available. We know of no exception to article 1409 of the Civil Code. It was the duty of the tutrix to protect those for whom she was appointed to act. If she failed to discharge her duty by causing the

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property of Mrs. St. Amand to be separated from that of the heir in the time and manner provided by law, or if the rights of the minors have been impaired by her neglect, she will be amenable therefor.

On the whole, we think the judgment of the Court below fully sustained by the law and the evidence.

Judgment affirmed, with costs.

No. 1721.—ALFRED DUPERIER v. B. F. FLANDERS et al.

A sale of cotton for Confederate notes, as the consideration is null, its enforcement by the courts of this State is prohibited. Constitution, article 127. This nullity extends to the transferees of the written act of sale of the cotton.

A party claiming the right to control property by virtue of possession must show that he acquired possession in a lawful manner. The unlawful use of force in gaining possession will not avail him.

A judgment of the lower court will not be amended between the appellees. 20 An. 307.

APPEAL from the Third District Court of New Orleans. *Emerson, J. J. S. Whitaker*, for plaintiff and appellee. *Samuel R. & C. L. Walker*, for intervenor, Talbert, appellant. *Charles S. Rice*, for Godwin, intervenor and appellee.

HOWE, J. The questions of law in this case are quite similar to those in *O'Donnell v. Burbridge & Co.* 20 Ann. 37.

On the tenth July, 1863, Silas Talbert sold to Isaac Levy & Co., of Alexandria, for Confederate money, one hundred bales of cotton in the seed, on the plantation of the former on Bayou Boeuf, to be ginned, baled and delivered to the vendees when called for—the latter furnishing bagging, rope and twine. Levy & Co. transferred their rights to H. M. Keary for Confederate money, and, for the same consideration, Keary transferred to Joseph Onterdick, who, in turn, made a transfer to the plaintiff for notes of Louisiana banks.

In November, 1865, about forty-nine bales of cotton were delivered to the plaintiff by Talbert, but the latter declined to deliver any more. The plaintiff then appears to have conceived the plan of having the cotton seized by one Burbridge, a supervising special agent of the treasury of the United States. We are informed by a letter of plaintiff that this seizure was made and the cotton directed to be consigned to the special agent "for adjudication," but we are not informed from what source the agent derived his authority to adjudicate private controversies of this nature. However this may be, the twenty-three bales of cotton which form the subject of this controversy were seized, in the seed, on the plantation of Talbert, in January, 1866, by an assistant treasury agent named McLean, who came with a corporal and a file of soldiers, who took possession of the premises and commenced ginning the cotton. "They baled," says the principal witness on this point, "forty-four bales of cotton. These

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forty-four bales were then removed by McLean or one O'Donnell, and taken to Holmesville and placed in charge of McStarring for shipment by McLean. The twenty-three bales were ordered to be shipped to F. J. Herron"—the plan of consignment to the treasury agent "for adjustment" being apparently abandoned as soon as the property had been forcibly wrested from the possession of Talbert.

At this point it is stated that the cotton was given over by McLean to an agent of the plaintiff, who thus obtained what the agent in his testimony chooses to denominate "constructive possession" of it. Such possession must have been purely constructive, for we next find the twenty-three bales in the hands of the defendant, Flanders, agent of the treasury, who would have returned them to Silas Talbert, if he had not been prevented by the writ of sequestration obtained by plaintiff when this action was instituted.

Flanders answered by a general denial, and an averment that he was in possession in his official capacity, and prayed that Talbert might be made a party. Talbert being cited, filed his answer, and also his exceptions, averring that the property was brought within this district by fraud, collusion and violence, and further alleging that the pretended contracts of purchase and transfer hereinbefore mentioned were null and void, the consideration being Confederate money.

D. R. Godwin intervened, claiming a privilege on the cotton, or its proceeds, for disbursements made by him in expenses and charges on said cotton.

The exceptions were cumulated with the merits, and the cause was tried before a jury, who rendered the following verdict:

"Verdict for plaintiff; 23-72 allowed intervenor when a correct bill is made out."

This finding was recorded, and judgment rendered in favor of plaintiff for the cotton claimed; but the claim of the intervenor was dismissed.

The defendant Talbert alone appealed. The intervenor, Godwin, as appellee, has filed answer in this court, claiming, by way of amendment, a judgment for the amount awarded him by the inscrutable verdict of the jury. The rules of practice do not permit us to consider his claim, since he has not himself appealed. *Fields v. Creditors*, 11 An. 545; *Coleman v. Haight*, 14 An. 564.

As between the plaintiff and the defendants we are of opinion that the verdict and judgment were erroneous. The plaintiff had no better title to the cotton than Onterdick—the latter had no better title than Keary, and Keary no better than Isaac Levy & Co. The title of Levy & Co. and of Keary was based upon the consideration of Confederate treasury notes, and we cannot recognize its validity. See case of *Cousin v. Abat*, just decided, and cases there cited.

The cotton was never delivered, in any way, by Talbert to plaintiff,

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and the plaintiff cannot be deemed to have gained any lawful advantage through the trespass and spoliation of McLean and his file of soldiers.

For the reasons given, it is ordered and adjudged that the judgment appealed from, so far as it dismisses the claim of the intervenor Godwin, be affirmed—that in all other respects it be avoided and reversed. It is further ordered that the demands of the plaintiff be rejected with costs in both courts, and that the property sequestered herein be delivered to Thomas L. Talbert, testamentary executor of Silas Talbert, now deceased.

Rehearing refused.

No. 1677.—B. BOISBLANC et als. v. PETER MARKEY.

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A purchaser of real estate cannot postpone the payment of the price until the decision of a suit for eviction, when the nature of the title on which the suit for eviction is founded is set out and described in the act of sale.

APPEAL from the Fifth District Court of New Orleans. *Leaumont, J. H. C. Miller*, for plaintiff and appellee. *E. Bermudez*, for defendant and appellant.

HOWELL, J. The defendant has appealed from a judgment condemning him to pay several promissory notes secured by the vendor's privilege and mortgage and given by him as part of the price of certain property sold to him by B. Boisblanc, one of the plaintiffs. His defense is that he has been sued for the said property, and that he is entitled to suspend the payment of the price until restored to quiet possession. Having joined in one action and asked that the vendor's lien and the mortgage be recognized and enforced against the property sold, and mortgages not being subject to the rules of commercial law in favor of third holders of commercial paper, all the plaintiffs herein will be considered upon the same footing.

The main question is, whether or not the defendant can postpone payment of the price until the decision of the suit instituted against him for the property, or require security from his vendor.

Article 2535 Civil Code provides: "If the buyer is disquieted in his possession, or has just reason to fear that he shall be disquieted, by an action of mortgage or by any other claim, he may suspend the payment of the price, until the seller has restored him to quiet possession, unless the seller prefer to give security.

There is an exception to this rule, where the buyer has been informed, before the sale, of the danger of the eviction."

The inquiry arises, is the defendant within the exception?

In the act of sale to him from Boisblanc, one of the plaintiffs, it is declared "that he does, by these presents, grant, sell, bargain and quit

B. Boisblanc et al. v. Peter Markey.

claim, under guarantee of his own acts and deeds *only, and of no others*, but with substitution and subrogation to all his rights and actions against all precedent and anterior vendors and owners, unto Mr. Peter Markey," (the defendant) the property now in controversy. The act also recites how the vendor acquired the property and shows that it had been proceeded against and sold under the confiscation laws of the United States, in which proceedings Boisblanc intervened and had his first mortgage recognized, which had been assumed by one S. Wolf, (the party now making the disturbance) as the purchaser of the property from a former owner, and at the sale Boisblanc became the purchaser at a price insufficient to pay the mortgage held and represented by him. In the sale to the defendant he expressly transfers these mortgage rights without any recourse.

This act of sale clearly and distinctly informs the defendant of the nature of the seller's title, and that of Wolf, who now sues for the property as owner, by virtue of that very title recited in the act of sale to him.

It is difficult to understand how more direct information could be communicated. We are not now to pass upon the validity of the disturbing claim, but simply whether or not the defendant can be coerced to pay the balance of the price pending the suit for eviction. and we are of opinion that he can.

It is ordered that the judgment of the District Court be affirmed with costs.

No. 1541.—WILLIAM T. HATCHETT v. H. B. PEGRAM, Executor.

Where a party signed a note as security in Louisiana, and after it is prescribed by the laws of the State he removes to Alabama, and demand of payment is there made of him by the holder and he pays the note, to enable him to recover from the maker in the courts of Louisiana, he must show that he was bound on the note as security by the laws of Alabama and was compelled to pay it. A voluntary payment of the note by the surety will not enable him to recover of the maker.

APPEAL from Second District Court, parish of Orleans. *Thomas, J. Elmore & King* for plaintiff and appellant. *Marr & Foute* for defendant and appellee.

WYLY, J. Plaintiff paid the note of N. J. Pegram, on which he was security, and now sues the succession of the latter to recover the amount he alleges he was compelled to pay on account thereof, basing his demand on the following note and receipt, viz :

"\$1136 26

"NEW ORLEANS, January 9, 1854.

"Two years after date we, or either of us, promise to pay to the

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order of Crisp, McGee & Co. eleven hundred and thirty-six dollars and twenty-six cents, with interest at six per cent. per annum.

(Signed)

" N. J. PEGRAM.

(Signed)

" WILLIAM T. HATCHETT,

"Security."

(Indorsed.)

"Received, Montgomery, Alabama, January 4, 1867, from William T. Hatchett, the security of this note, the sum of sixteen hundred dollars, in full payment of same.

(Signed)

"R. B. MCGEE,

"By his attorneys, Cook, Enoch & Allen."

The defense is a general denial, and averments that the note was a Louisiana contract, entered into by parties residing in this State, and that the obligation was extinguished by prescription at the time the security, Hatchett, professes to have paid it, the note being then eleven years past due. The defendant also alleges that if the plaintiff paid the note in Alabama on fourth January, 1867, as alleged, it was a mere voluntary act on his part, which imposed no obligation on the succession of N. J. Pegram. That the latter was residing in this city at the time he made the note, and continued so to reside till his death, which occurred long after the note had been prescribed by the laws of this State.

The court rendered judgment in favor of the defendant and the plaintiff has appealed.

There can be no doubt that the note, as regards the succession of Pegram, was extinguished by prescription under the laws of this State where the succession was opened. C. C. 3505.

But was the obligation extinguished as regards the security, William T. Hatchett, on the fourth January, 1867, when he paid it in the State of Alabama where he then resided? Was he bound by the laws of that State to pay it? If so, can he recover the amount so paid from the estate of the principal debtor?

These are the main questions to be determined in this case. As to the liability of the security Hatchett in the State of Alabama, where he resided at the time, the laws of that State must govern, the only defense to the note being the plea of prescription.

Was the note prescribed under the laws as administered in the State of Alabama?

We find in the record the opinions of Judge Walker and other eminent jurists of that State, which were received as evidence without objection. In determining the liability of the plaintiff, great weight should be given to these opinions; they were received as testimony in this case.

Judge Walker testifies that he had no means of judging of Hatchett's liability except from what appeared upon the note itself, and in his

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opinion he was liable thereon at the time he paid it; that six years was the period prescribed in the statute of limitations, "but on the twenty-first September, 1865, the convention of the State of Alabama adopted an ordinance directing that in computing the time necessary to create the bar of the statute of limitations, the time elapsing between the eleventh day of January, 1861, and the passage of this ordinance (twenty-first September, 1865), should not be estimated. This ordinance is law in the State of Alabama. After deducting the interval prescribed in the ordinance from the period intervening, between the time when the note became due and the fourth January, 1867, there will not remain six years. It is therefore my opinion, says he, that under the laws of the State of Alabama the defense of the statute of limitations would not have been available to Hatchett in a suit commenced against him on fourth January, 1867. In attaining this conclusion I have considered the question springing from the fact that a suit on the note was barred in 1862, before the adoption of the ordinance, unless the operations of the statute were interfered with by Hatchett's absence from the State, of which I am not informed. The question thus arising, says he, is this, whether it was competent for the convention of the State of Alabama to change the period of limitation to an action on a contract after the time necessary to perfect a bar under the pre-existing law. In my opinion on the law as recognized and administered in this State, it was competent."

He further states that this view has been sustained by the Supreme Court of Alabama recently in a case presenting an analogous question, and that the principle has been settled by decisions extending as far back as 1850. When asked by the defendant in his second cross-interrogatory what would be the effect on the accessory obligation of surety if from any cause the principal obligor had been discharged, the witness said: "In 1837 it was decided by the Supreme Court of Alabama that as a general rule the extinction of the liability of a principal debtor was also an extinction of the liability of the surety, but that an exception prevailed when the extinction was caused by operation of law," etc. He referred to various subsequent decisions to the same effect, and said, in his opinion, the law as thus laid down in 1837 was the law of Alabama on fourth January, 1867.

The other distinguished jurists, who were examined in this case, entertained the same view of the subject as Judge Walker, and they adopted his opinion as a true exposition of Alabama law.

It appears, however, that the opinions of these witnesses were based upon what appeared on the face of the note without reference to the effect of Hatchett's absence from the State of Alabama, of which they say they were not informed. If Hatchett only moved from this State to Alabama after prescription had accrued upon the contract which he made here, does the ordinary statute of limitations of that State apply?

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It appears by the Code of Alabama, article 2487, that "when the statute of limitations of another State or foreign country has created a bar to an action upon a contract or act done in such State or country, whilst the party sought to be charged thereby was a resident of such State or country, the bar thus created is effectual in this State against any suit brought therein, in the same manner it would have been in the State or country where the act was done or contract made."

This seems to be the law of the State of Alabama, specially applicable to persons of that State who are sought to be held liable on contracts made in other States and barred by the statutes thereof before moving therefrom. Assuming then that the ordinance of the Alabama Convention of 1865 was valid, and that in computing the time necessary to create the bar of the statute of limitations, no estimation is to be made of the time clapsing between the eleventh January, 1861, and twenty-first September, 1865, how does that affect the article of the Code of Alabama just quoted in reference to contracts made in another State and prescribed by the laws thereof before the party sought to be held liable moved from that State to Alabama?

Did the ordinance necessarily repeal the article of the Code? We think not. That article designated a certain class of cases where the prescription laws of other States should be permitted to apply. We understand the action of the convention, if valid, to modify the statute of limitation in Alabama, so that in making the estimate the period of the war was not to be computed.

The ordinance does not expressly repeal the article referred to, nor is it inconsistent therewith. It does not pretend to interfere with the law which permits the prescription laws of other States to be applied in certain cases.

The contract was entered into in this State, where the maker of the note and the payee thereof resided, and where we presume the security Hatchett also resided. In the absence of proof to the contrary we will presume that the surety on a Louisiana contract was an inhabitant of the State. If Hatchett moved to Alabama after the note had prescribed here, under the article of the Alabama Code referred to, we think he was not bound to pay it; and that the payment of an obligation, already extinguished as to both principal and surety, by the latter, does not give him a cause of action against the former. C. C. 3025.

As Hatchett paid the note without being sued, he cannot recover against the defendant without proving that he was bound to do so. The note was as its face prescribed and the onus is on him to show that he was liable at the time he paid it.

It is proved that the plaintiff lived in Alabama when he paid the note (January 4, 1867), and that he resided there several years previously. According to our laws the note had been prescribed nearly six

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years when he paid it. He may have lived there several years prior to the payment, and yet the note may have been prescribed before he moved from this State. Moreover, it does not appear from the record that the note had been indorsed by the payees, Crisp, McGee & Co., or that they authorized R. B. McGee to collect it. On the whole, we think plaintiff has failed to make out his case. He has not established with legal certainty that he was bound by the laws of Alabama to pay the note.

It is therefore ordered that the judgment appealed from be set aside, and it is now ordered that there be judgment as of non-suit, and that appellee pay costs of appeal.

Rehearing refused.

No. 1712.—PIERRE POUTZ v. A. F. JONES.

The testimony of a witness taken by commission will not be allowed to go to the jury, if it contains nothing but hearsay evidence.

A witness on the stand will not be permitted to give opinions in answer to hypothetical questions.

APPEAL from the Fifth District Court of New Orleans—*Leaumont, J. A. & M. Voorhies* for plaintiff and appellee. *Hornor & Benedict* for defendant and appellant.

TALIAFERRO, J. The plaintiff alleges that he bought from defendant twenty-six bales of cotton, represented by samples to be of good quality, and shipped the cotton to the port of Havre, in France, where it was sold in like manner as being of good quality. That subsequently when the bales were opened, it was found that their exterior parts, to the depth of five or six inches, were composed of good merchantable cotton, and the interior filled with a very inferior article of cotton called "pickings." That the difference in quality caused the plaintiff a heavy loss, amounting to five hundred and eighteen dollars and eighty-six cents, which he was compelled to refund to his vendee at Havre. He brings this suit against the defendant to compel him to pay this sum, with legal interest from judicial demand.

The answer is a general denial. The case was tried before a jury, which rendered a verdict for the sum claimed with legal interest from judicial demand. The defendant has appealed.

Three bills of exception appear in the record. The first was taken to the admission of the testimony of Villeman, a witness on the part of the plaintiff, taken at Havre under commission. The objection was that his evidence was hearsay, and that he proved nothing of his own knowledge. We think the testimony should have been rejected. The witness stated that he was called upon to examine twenty-six bales of cotton, which he was informed by Messrs. Le Roux Freres & Co. was

Pierre Poutz v. A. F. Jones.

shipped by P. Poutz, of New Orleans, and that they were the claimants. He stated, in substance, that he had no knowledge of the lot of cotton except from their statements. He states the bales were marked J. J. D. In the absence of any other facts within his own knowledge, this can hardly be considered an identification of the cotton.

The next bill of exceptions is to the refusal of the court to admit a witness to answer whether it would have been possible, in April, 1866, for twenty-six bales of cotton to have been put up in and sent out of "Justamond's pickery" in the condition it is alleged the twenty-six in question were? The objection was, that it was to elicit the opinion of the witness, which would be incompetent evidence. The testimony was properly rejected.

The third bill of exceptions was taken to the admission of the testimony of Poutz, the plaintiff. This objection is without weight.

A careful review of the evidence satisfies us that the plaintiff has fully made out his case, and that it amply sustains the verdict of the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Rehearing refused.

NO. 1733.—SAMUEL and LOUIS FASNACHT v. WILLIAM WINKELMAN and FRANK HEUER.

Where a lease has been given for one year, with a privilege of renewal for five years, and a third party binds himself as surety for the lease, and the lease is renewed at the expiration of the year, the surety is not bound on the extended lease, unless it is shown that he consented to the extension.

APPEAL from the Fifth District Court of New Orleans—*Leaumont, J. G. Schmidt* for plaintiffs and appellees. *Buchanan & Gilmore* for defendants and appellants.

HOWELL, J. The plaintiffs leased to the defendant Winkelman certain property for one year, from first August, 1865, with the privilege of renewing the lease for four years more for the same price and under the same conditions, provided written notice be given to the lessors at least three months before the thirty-first July, 1866. The defendant Frank Heuer intervened in the act, and "declared that he hereby binds himself, jointly and *in solido*, with and as security for the said lessee, for the punctual payment of the rent herein stipulated, and of all costs and damages resulting from any violation of any of the conditions of the foregoing lease, hereby consenting to be bound as if he were the principal obligor herein, and renouncing the plea and benefit of discussion or division granted by law to sureties."

The thirty days' notice was given by the lessee; and in September,

Samuel and Louis Faanacht v. William Winkelman and Frank Heuer.

1867, this suit was instituted for the quarterly rent due on first of August of that year. The defendants filed separate answers, Heuer alleging that his responsibility ceased on thirty-first July, 1863, and was not renewed. Judgment was rendered against both *in solido*, and Heuer appealed.

There is no proof that Heuer consented to the extension or renewal of the lease; but plaintiffs say that by his contract he was as much their tenant as Winkelman, and that the acts of the latter were his acts, of which he is not permitted to plead ignorance. This position is untenable. The lease was made to Winkelman as the tenant, and Heuer became his security, bound, it is true, as if he were the principal obligor in the lease, but only for the term of that lease, to wit, one year. The faculty of renewing was a privilege or right, to be exercised by the lessee upon a given condition, and not an obligation assumed by the surety. He was liable to the same obligations as the debtor himself (C. C. 8014, 2036) during the lease, but he did not agree to be bound in the renewed or extended lease by the giving of the required notice to the lessors by the lessee. The clause in relation to the renewal only bound the lessors and the lessee to the same price and conditions, if the lease were renewed, as contemplated. The consent of the surety was necessary to bind him on the extended lease. His consent cannot be presumed from the terms of the original lease.

It is, therefore, ordered, that the judgment herein against Frank Heuer be reversed, and that there be judgment in his favor, with his costs in both courts.

Rehearing refused.

21 728
48 676

21 728
123 39

No. 2291.—STATE OF LOUISIANA ex rel. WESTERN UNION TELEGRAPH COMPANY v. JUDGE OF THE SEVENTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

A writ of mandamus will not issue to compel the District Judge to grant a suspensive appeal when it is shown that the amount of the judgment is not sufficient to give the Supreme Court jurisdiction of the appeal.

The amount necessary to the jurisdiction of the appellate Court is the sum in controversy at the time of judgment.

The right to remit the whole or a part of the claim by the suing creditor may be exercised at any time before final judgment.

APPPLICATION for a Writ of Mandamus. *E. Wooldridge*, for relator. *Collens, J.* in *pro. per.*

HOWELL, J. This is an application for a writ of mandamus to compel the Judge of the Seventh District Court for the parish of Orleans to grant the relator a suspensive appeal from a judgment rendered in the suit of *C. Seiler & Co. v. The Western Union Telegraph Company*, which appeal the Judge, in his answer, says was refused because the amount in dispute does not exceed five hundred dollars.

State of Louisiana ex rel. Western Union Telegraph Company v. Judge of the Seventh District Court for the Parish of Orleans.

The demand was for twelve hundred and sixty-four dollars and twenty cents, but on the day following the trial and before judgment was rendered, the plaintiffs entered a *remittitur* of several items amounting to seven hundred and sixty-five dollars and twenty cents, and asked for judgment for the sum of four hundred and ninety-nine dollars, with costs. A week afterwards they were permitted to correct the *remittitur* in the form in which it was stated, but the sum demanded was not changed.

By this act plaintiffs' demand was reduced to four hundred and ninety-nine dollars, no interest being asked for on said sum, and, as held in the case of *Wolf v. Munzenheimer* (14 An. 114), where the plaintiff before judgment enters a *remittitur*, by the effect of which the amount in contestation does not come within the jurisdiction of this Court, no appeal will lie.

The amount necessary to the jurisdiction of the appellate Court is the sum in controversy at the time of the judgment. 2 How. 73.

The right of the plaintiffs to remit or discontinue the whole or a part of their claim, cannot well be denied, and after the remission was made by them, the Court could not render a judgment for more than four hundred and ninety-nine dollars, which was all that was demanded, was the matter then in dispute, and is less than the jurisdiction of this Court. 7 N. S. 361; 2 L. 102, 236; 2 A. 136; 14 A. 643; 16 A. 431; C. P. 491.

It is, therefore, ordered, that the application for a writ of mandamus be refused, at the costs of the petitioner.

No. 1715.—J. A. HAGGERTY, for the use, etc., v. J. A. PHILLIPS, et als.

All the parties to the suit must be made parties in an action to annul the judgment.

APPEAL from the Third District Court of New Orleans. *Emerson, J. D. C. Labatt and Alexander Walker*, for plaintiff and appellant. *C. Roselius & Alfred Phillips*, and *W. H. Hunt*, for defendants and appellees.

HOWELL, J. This suit is brought against certain parties alleged to be purchasers of nineteen lots of ground in New Orleans, sold under executory process in the suit of *R. M. Denman v. J. A. Haggerty*, No. 18,500, on the docket of the Third District Court of New Orleans, at which sale the said lots were adjudicated to Denman, the plaintiff in said suit, and by him subsequently sold to the defendants herein. The plaintiff, Haggerty, alleges that all the proceedings in said suit are absolutely null and void for various reasons set out in his petition, and, without making Denman a party to this suit, asks that the said proceedings and adjudication be declared null, and he recognized as the

J. A. Haggerty, for the use, etc., v. J. A. Phillips, et als.

lawful owner of the said lots, and quieted in the possession thereof. The defendants excepted, that plaintiff cannot maintain this action against them, because it is one to annul the proceedings and judgment in a suit to which they were not parties, and the parties to which are not made parties to this.

The exceptions were maintained and the plaintiff has appealed.

Articles 604-613, C. P., limit the action of nullity to the parties to the judgment and the court that rendered it. *Clark v. Christine*, 12 L. 394; *Twichel v. Bordelon*, 9 R. 191. But plaintiff's counsel contend that this is really a petitory action, and that the nullity is merely an incident, and being absolute, may be collaterally declared. It is true that the proceedings assailed are alleged in the petition to be absolutely null; but when the grounds of their nullity are set forth, they are found to be relative. He alleges that the Third District Court of New Orleans was ousted of jurisdiction of the matter by certain military orders then in force, but does not describe them; that he was a loyal citizen and entitled to the benefit of said orders; that he had not, as alleged, permanently left the State; and the appointment of a curator *ad hoc* was illegal; that if he had been absent, an attorney for the absent defendant, and not a curator *ad hoc* should have been appointed; that the allegation of his absence should have been proven by authentic evidence; that the curator *ad hoc* failed to perform his duties and exceeded his authority; that the property was sold at an inopportune time and for one-third of its value; that no legal notices were given to petitioner or any one legally authorized to represent him, and that said Denman without pursuing strictly the legal formalities has caused the sheriff illegally to adjudicate the said property to him, and that he and his vendees, the defendants herein, are possessors in bad faith, and are bound by the defects in their pretended titles.

It seems clear that in such an action, the parties to the proceedings sought to be avoided, are necessary parties.

It is therefore ordered that the judgment appealed from be affirmed with costs.

NO. 2319.—THE STATE ex rel. MITCHELL, CRAIG & CO. v. THE JUDGE OF THE SIXTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

An appeal bond is valid if each of the sureties bind himself for half the entire amount. The decision in the case of the State ex rel. Roman v. Judge of the Sixth District Court parish of Orleans (ante page 443) reaffirmed.

The Supreme Court will examine into the validity, and sufficiency of the security on the appeal bond on an application for a prohibition; and if the bond is legal in form, and the security good and solvent, the prohibition will issue pending the appeal.

APPLICATION for a Writ of Prohibition. *Honor & Benedict*, for relators. *W. H. Cooley, J.*, in *pro. per.*

WYLY, J. This is an application for a writ of prohibition to restrain the Sixth District Court from executing the judgment styled J. R.

The State ex rel. Mitchell, Craig & Co. v. The Judge of the Sixth District Court for the Parish of Orleans.

Wolf, by his agents, etc., *v. Mitchell, Craig & Co.*, from which judgment a suspensive appeal has been taken to this court.

The relators aver that their said appeal has been wrongfully dismissed for insufficiency of the appeal bond, and their property has been seized under an execution issuing from said court, although divested of jurisdiction by virtue of said suspensive appeal.

The question to consider is, is the appeal bond good and solvent, and such as the law requires?

That the sureties bound themselves each for half the entire amount of the bond does not invalidate it. 21 A. 443.

The sureties are Sampson Bros., and William and James McCracken, two commercial firms of this city who, the evidence shows, are perfectly good and solvent. James McCracken signed the name of the firm to the bond with the authority of his brother and partner, William McCracken.

The firm name of Sampson Bros. was signed by Chandler Sampson. It is in proof also that he is individually worth over and above all his liabilities the amount for which he bound the name of the firm. If he had no authority to bind his brother and partner, at least he bound himself.

We consider the bond perfectly good and sufficient.

It is therefore ordered that the writ of prohibition be granted, and that the Judge of the Sixth District Court and J. R. Wolf be prohibited from proceeding in the case of J. R. Wolf by his agent, etc., *v. Mitchell, Craig & Co.*, during the pending of the suspensive appeal therein.

NO. 1761.—CHARLES CASE, Receiver of First National Bank of New Orleans *v. ROBERT WATSON and JAMES E. DUNHAM.*

Evidence is not admissible to establish facts set up in an exception filed after issue has been joined by the filing of an answer.

The maker of a promissory note cannot set up in defense to its payment that the holder is not the true owner, unless he show that the assignment or transfer is fictitious and fraudulent, and made to deprive him of substantial defense against the true owner.

APPEAL from the Fifth District Court of New Orleans. *Leaumont, J. J. D. Rouse and George L. Bright*, for plaintiff and appellee. *Fellows & Mills*, for defendants and appellants.

TALIAFERRO, J. The plaintiff, as indorsee of a promissory note drawn by Watson, one of the defendants, to the order of his codefendant, Dunham, for the sum of \$1300 (thirteen hundred dollars), brought this action against the maker and indorser. The defendants answered by general denial—admitted signing the note, but specially denied the right or capacity of the plaintiff to stand in judgment, and that the plaintiff is receiver as he sets himself out to be.

Charles Case, Receiver of First National Bank of New Orleans v. Robert Watson and James L. Dunham.

They aver that no receiver of the First National Bank has ever been legally appointed. The defendant Watson afterwards filed a supplemental answer and exception, the substance of which is, that all the proceedings relating to the taking possession by an officer of the treasury department, of the assets, books, records and archives of the bank were irregular, illegal and null and void. That the bank has never been put in default as required by the currency act of the United States; that the officers of the bank have been kept forcibly from the charge and control of the bank and assets, etc.

On the trial of the case, the defendant Watson offered evidence to prove the allegations contained in this supplemental answer and exception, which being objected to on the ground that defendant had no right to set up in this action any of the allegations so made, and on the further ground that the matters so set up in the exception could not be pleaded after answer filed, the court sustained the objections and excluded the testimony, and the defendant reserved a bill of exceptions. We think the ruling of the court correct.

There was judgment for the plaintiff and the defendant, Watson, has appealed.

There is no error in the judgment. The defendant does not pretend that the note sued upon has been lost or stolen, or that he has equities against the real owner, or any other ground whatever that can be considered a legitimate defense.

It has been repeatedly decided that a defendant has no right to inquire whether plaintiff, in whom the legal title appears to be vested, be an agent or real owner, unless, by a fictitious assignment, it be attempted to deprive him of substantial grounds of defense which he may have against the true owner. He would be protected by a payment of the note to the plaintiff, and it is of no importance to him whether the plaintiff be the receiver of the bank or not. The authorities on the point are numerous. 3 N. S. 291, 392; 4 N. S. 107; 2 L. R. 263; 4 L. 220; 14 L. 254; 2 An. 441; 11 An. 689; 19 An. 182; 13 L. R. 94; 20 An. 24.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

Messrs. Justices Howell and Howe recused.

State of Louisiana ex rel. City of New Orleans v. The Judge of the Sixth District Court for the Parish of Orleans.

No. 2317.—STATE OF LOUISIANA ex rel. CITY OF NEW ORLEANS v. THE JUDGE OF THE SIXTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

21	733
119	450
21	733
125	316

Under the act of the General Assembly, No. 16, approved February 5, 1869, the District Courts of the parish of Orleans, except the First and Second District Courts, are required to be kept open on all legal days, except from Christmas to the second of January, from the first Monday of November until the fourth day of July; and for the purpose of considering writs of arrest, habeas corpus, mandamus, etc., they are required to remain open on all legal days during the whole year; and any judgment rendered on mandamus or other conservatory proceeding out of term time may be appealed from on motion in open court the same as though it had been rendered in regular term.

A third party wishing to appeal from a judgment making a mandamus peremptory out of term time, may do so by motion in open court the same as the defendant could, and without petition and citation.

APPPLICATION for a Writ of Mandamus. *H. J. Leovy & Monroe* and *Alfred Phillips* for relator. *W. H. Cooley*, Judge, respondent, in *pro per*.

WYLY, J. The relator seeks to compel the Judge of the Sixth District Court to grant a suspensive appeal on motion from the judgment rendering peremptory the mandamus sued out in the case of the New Orleans Republican Printing Company v. J. O. Landry, Controller. The Judge of the Sixth District Court, for cause why the mandamus herein should not be granted, shows:

First—That the application for appeal was made during vacation of court and should have been by petition instead of a motion.

Second—That the city of New Orleans not being a party to the proceedings could not intervene by motion. The mandamus sought to be appealed from was rendered peremptory in August, 1869, and the application for appeal was made during the same month.

Under the act of 1843 "the party intending to appeal may do so by petition or by motion in open court at the same term at which the judgment was rendered." * * * * *

Act No. 16 of 1869, provides: "That except the First and Second District Courts, the District Courts of the parish of Orleans, shall be open at ten o'clock A. M., and shall remain open till three o'clock P. M., on all legal days (except from Christmas to the second of January), from the first Monday of November to the fourth of July, and for granting interlocutory orders and writs of arrest, habeas corpus, injunctions, sequestrations, attachments, mandamus, and provisional seizures, on a motion to quash and not upon their merits, they shall remain open on all legal days during the whole year." * * * *

The application for appeal, though made after the court was closed for ordinary litigation, was made while the court was open for granting judgments of the character presented in this case.

For granting a mandamus, the court remains open on all legal days of the year, and there is no more limitation on the power of the judge to act in such a case in the month of August, than in any other month.

State of Louisiana ex rel. City of New Orleans v. The Judge of the Sixth District Court for the Parish of Orleans.

Shall we say the court is open to grant the judgment and give it effect, and yet say it is closed against the party moving for an appeal? We think not. If the court be open to try the case, we think it also open to entertain a motion for appeal. Indeed the act of 1843 expressly gives the party intending to appeal the right to do so by motion at the same term at which the judgment was rendered.

We also think untenable the other position taken by the learned judge. It is this: The city of New Orleans not being a party to the proceeding, could not intervene by motion to obtain a suspensive appeal.

"The right of appeal is given not only to those who were parties to the cause in which a judgment has been rendered against them, but also to third persons not parties to such suit when such third persons allege that they are aggrieved by the judgment." C. P. 571.

By article 573 it is declared that: "Whoever intends to appeal must present a petition to that effect to the court which has rendered the judgment by which he believes himself aggrieved, praying to be allowed to appeal from such judgment, and offering to give such surety as the court may direct." * * * The statute of 1843 amends this article thus: "That the party intending to appeal may do so, either by petition or by motion in open court, at the same term at which the judgment was rendered." * * *

The counsel for the district judge makes a verbal criticism upon the terms employed in the statute, and insists that the expression, "the party intending to appeal," refers only to the parties to the suit, and not to third persons, also having the right to appeal. We cannot thus limit the obvious meaning of the statute. It is an amendment to article 573, declaring that whoever intends to appeal may do so by petition, etc. The evident object of the statute was not to discriminate between persons entitled to appeal, but to provide another, perhaps more convenient mode of obtaining the order of appeal.

In construing the statute, we must regard the object of the act, rather than the precision of the language employed or the niceties of grammar.

At any rate, if the language of the statute creates doubt, we will give that doubt in favor of the right to appeal.

To facilitate and simplify the remedy of appeal, two statutes were passed. One was the act of 1839, preventing the dismissal of appeal when the error, irregularity or defect is not imputable to the appellant. The other is the statute of March 22, 1843, by which it is declared the party intending to appeal may do so by petition or by motion in open court, at the same term at which the judgment was rendered. * * * 3 An. 7.

It is, therefore, ordered that the mandamus herein be made peremptory.

The State ex rel. Rosette E. Storrs et al. v. The Judge of the Fourth District Court for the Parish of Orleans.

No. 2453.—THE STATE ex rel. ROSETTE E. STORRS, et al., v. THE JUDGE OF THE FOURTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

21	735
e122	50
122	51

The Supreme Court will examine into the sufficiency of the surety on an appeal bond on application for a writ of prohibition, and if the surety is found to be good, the prohibition will issue restraining the Judge from executing the judgment until the appeal is decided.

A PPLICATION for a Writ of Prohibition. *Theard, J.*, defendant.
John A. Grow for relator.

WYLY, J. This is an application for the writ of prohibition to restrain the execution of an order of seizure and sale granted by the Judge of the Fourth District Court, in the suit of Edward Thompson v. Rosette E. Storrs and husband, from which judgment a suspensive appeal has been taken.

The relator avers that her appeal has been wrongfully dismissed by the District Judge on the ground of the insufficiency of the surety, and that her property has been seized to satisfy the judgment or order appealed from; that the appeal bond is good and solvent as shown by the evidence; and the said Court is divested of jurisdiction of said cause by virtue of the appeal.

The District Judge says: "That the question in No. 2453 for a prohibition is: Can one appeal from a decision setting aside an order of appeal, when the setting aside of the appeal is based on the insolvency of the surety on the appeal bond?" We do not so understand the question presented in this case.

The simple question is: Is the surety on the appeal bond good and solvent?

That this Court has the right to revise the judgment of the Court *a qua* on the question of the solvency of the surety on an appeal bond, and issue the writ of prohibition in aid of its appellate jurisdiction, is no longer an open question. 21 Am. 43, 64, 113, 153, and the authorities there cited.

The amount of the appeal bond is two thousand dollars, and the surety, Albert Holzinger, swears that he is worth that amount clear of all debts; that he resides here; that his property here consists in stock in trade, money in bank and pocket, and about six thousand dollars outstanding, mostly for money loaned; that he has two stores, one at 20 Camp street and the other at 7 St. Charles street; that the stock in both is about six thousand dollars; that he owes in all about two thousand two hundred dollars. Also, that he owns a judgment in the United States District Court against solvent parties for which he has been offered ten thousand dollars cash, and refused it. Also, that he is worth in this parish, over and above all liabilities, over twenty thousand dollars.

There is no evidence to the contrary, and we are bound to conclude that the surety is good and sufficient.

The State ex rel. Rosette E. Storrs et al. v. The Judge of the Fourth District Court for the Parish of Orleans.

It is, therefore, ordered, that the prohibition issued herein be made perpetual, and the Judge of the Fourth District Court, parish of Orleans, be ordered not to proceed further in the suit of Edward Thompson v. Rosette E. Storrs and husband, and to allow the transcript of the record thereof to be sent to the Supreme Court as if the order dismissing the suspensive appeal had not been rendered.

NO. 2452.—THE STATE ON THE RELATION OF ROSETTE E. STORRS v. THE JUDGE OF THE FOURTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

An appeal will lie from an interlocutory order dissolving an injunction on the ground that the surety on the injunction bond is not good and solvent, and a writ of mandamus will issue to compel the Judge to send up the record.

APPPLICATION for a Writ of Mandamus. *Paul E. Thcard, J.*, in *pro. per. John A. Grow* for relator.

WYLY, J. This is an application for the writ of mandamus to compel the Judge of the Fourth District Court to grant a suspensive appeal from his order dissolving the injunction in the case of Rosette E. Storrs v. Edward Thompson *et al.*

The District Judge presents for our consideration two propositions, which he insists can only be decided in the negative, and which justify the course he has taken in the premises, viz :

1. "Does an appeal lie from a decision dissolving an injunction, when the sole ground for the dissolution is the insolvency of the surety on the injunction bond?"

2. "Can your Honors revise my judgments in the matters relative to the solvency of sureties?"

He insists that great detriment will occur in the administration of justice if Judges, in the first instance, are not to be the sole judges of the sufficiency and solvency of sureties.

The District Judge, from the evidence, arrived at the opinion that the surety was not sufficient, and therefore dissolved the injunction.

If the opinion of the District Judge be correct, the injunction was properly dissolved; if not, it was improperly dissolved and the relator has been aggrieved. The relator seeks to have that opinion revised by this Court. C. P. 570.

If the judgments of the courts of the first instance were always correct, an appeal would be unnecessary in any case; but for fear of error or misapprehension of the law, and the merits of causes, the remedy of appeal has been provided to revise the judgments of District Courts. C. P. 570, 571, 573, 575.

The right of appeal is not only given from final judgments, but likewise from all interlocutory judgments, when such judgment may cause an irreparable injury. C. P. 565, 566.

The State on the relation of Rosette E. Storrs v. The Judge of the Fourth District Court for the Parish of Orleans.

It is quite immaterial upon what ground the judgment is based, whether it be upon matters relative to the solvency of sureties or upon any other ground, the right of appeal is preserved. Where the law has not discriminated, we cannot discriminate, however detrimental to the administration of justice.

The relator in this case moved for an appeal on the ground that the order dissolving the injunction caused her an irreparable injury. The District Judge said no; "an injunction was ordered to issue in this case on petitioner furnishing bond with good and solvent surety. She has failed to furnish that surety, therefore there is no injunction, and consequently nothing to appeal from. Appeal refused."

The learned Judge decided that the surety was not good and solvent, and therefore dissolved the injunction. The relator wishes to have that judgment revised, on the ground that it works her an irreparable injury.

Under the articles of the Code of Practice to which we have adverted, she certainly has this right; and in our opinion the proper administration of justice requires the right of appeal to be preserved in all cases permissible by law. 21 An. 64, 153, and the authorities there cited.

It is, therefore, ordered that the mandamus herein be made peremptory.

NO. 2137.—EMILY HATCHER AND HUSBAND v. JARED R. JACKSON.

The minor has a legal mortgage on the property of the tutor or tutrix to secure the faithful administration of his estate. C. C. 3298.

Where the mother of minor heirs contracts a second marriage without the consent of a family meeting, she loses the tutorship, but if she first obtains the consent and approval of a family meeting she retains the tutorship, and her second husband becomes the co-tutor to the minors by a former marriage. In such a case the property of the co-tutor is not under legal mortgage for the faithful administration of the tutorship.

A PPEAL from the Fifth Judicial District, parish of East Feliciana. Posey, J. *McVea & Hunter*, and *Campbell, Spofford & Campbell*, for plaintiffs and appellants. *Cross & Hardee*, and *Race, Foster & E. T. Merrick*, for defendant and appellee.

TALIAFERRO, J. The plaintiff, Emily Hatcher, wife of John Marston, alleging that she has a legal mortgage on certain lands of the defendant, brings this suit to enforce it. She avers that her right of legal mortgage grew out of indebtedness to her during her minority by her mother as tutrix and Thomas Davis, her co-tutor. That this indebtedness was fixed by judicial decree of the proper tribunal on the sixth June, 1866, at \$41,165 44, with legal interest, with recognition of tacit mortgage in her favor on all the immovable property that belonged to the said tutrix and co-tutor during and since the tutorship—a period extending from the year 1844.

The State ex rel. Rosette E. Storrs et al. v. The Judge of the Fourth District Court for the Parish of Orleans.

It is, therefore, ordered, that the prohibition issued herein be made perpetual, and the Judge of the Fourth District Court, parish of Orleans, be ordered not to proceed further in the suit of Edward Thompson v. Rosette E. Storrs and husband, and to allow the transcript of the record thereof to be sent to the Supreme Court as if the order dismissing the suspensive appeal had not been rendered.

NO. 2452.—THE STATE on the relation of ROSETTE E. STORRS v. THE JUDGE OF THE FOURTH DISTRICT COURT FOR THE PARISH OF ORLEANS.

An appeal will lie from an interlocutory order dissolving an injunction on the ground that the surety on the injunction bond is not good and solvent, and a writ of mandamus will issue to compel the Judge to send up the record.

APPPLICATION for a Writ of Mandamus. *Paul E. Théard, J., in pro. per. John A. Grow* for relator.

WYLY, J. This is an application for the writ of mandamus to compel the Judge of the Fourth District Court to grant a suspensive appeal from his order dissolving the injunction in the case of Rosette E. Storrs v. Edward Thompson *et al.*

The District Judge presents for our consideration two propositions, which he insists can only be decided in the negative, and which justify the course he has taken in the premises, viz:

1. "Does an appeal lie from a decision dissolving an injunction, when the sole ground for the dissolution is the insolvency of the surety on the injunction bond?"

2. "Can your Honors revise my judgments in the matters relative to the solvency of sureties?"

He insists that great detriment will occur in the administration of justice if Judges, in the first instance, are not to be the sole judges of the sufficiency and solvency of sureties.

The District Judge, from the evidence, arrived at the opinion that the surety was not sufficient, and therefore dissolved the injunction.

If the opinion of the District Judge be correct, the injunction was properly dissolved; if not, it was improperly dissolved and the relator has been aggrieved. The relator seeks to have that opinion revised by this Court. C. P. 570.

If the judgments of the courts of the first instance were always correct, an appeal would be unnecessary in any case; but for fear of error or misapprehension of the law, and the merits of causes, the remedy of appeal has been provided to revise the judgments of District Courts. C. P. 570, 571, 573, 575.

The right of appeal is not only given from final judgments, but likewise from all interlocutory judgments, when such judgment may cause an irreparable injury. C. P. 565, 566.

The State on the relation of Rosette E. Storrs v. The Judge of the Fourth District Court for the Parish of Orleans.

It is quite immaterial upon what ground the judgment is based, whether it be upon matters relative to the solvency of sureties or upon any other ground, the right of appeal is preserved. Where the law has not discriminated, we cannot discriminate, however detrimental to the administration of justice.

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Under the articles of the Code of Practice to which we have adverted, she certainly has this right; and in our opinion the proper administration of justice requires the right of appeal to be preserved in all cases permissible by law. 21 An. 64, 153, and the authorities there cited.

It is, therefore, ordered that the mandamus herein be made peremptory.

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A PPEAL from the Fifth Judicial District, parish of East Feliciana. Posey, J. *McVea & Hunter*, and *Campbell, Spofford & Campbell*, for plaintiffs and appellants. *Cross & Hardee*, and *Race, Foster & E. T. Merrick*, for defendant and appellee.

TALIAFERRO, J. The plaintiff, Emily Hatcher, wife of John Marston, alleging that she has a legal mortgage on certain lands of the defendant, brings this suit to enforce it. She avers that her right of legal mortgage grew out of indebtedness to her during her minority by her mother as tutrix and Thomas Davis, her co-tutor. That this indebtedness was fixed by judicial decree of the proper tribunal on the sixth June, 1866, at \$41,165 44, with legal interest, with recognition of tacit mortgage in her favor on all the immovable property that belonged to the said tutrix and co-tutor during and since the tutorship—a period extending from the year 1844.

Emily Hatcher and Husband v. Jared R. Jackson.

The defendant denies that the plaintiff has the right claimed upon the land owned by him, or that she has a legal demand against her co-tutors. He pleads that the purchase price of the land now sought to be made liable to legal mortgage having been received by plaintiff's mother, acting as administratrix of the estate of Thomas Davis, the former co-tutor, and carried into the account and distributed according to a tableau to which plaintiff was a party, the sale was tantamount to a probate sale relative to her, and the property cleared of any claim she might have. He also pleads the prescription of three, four and five years.

It seems that the father of the plaintiff, Hiram Hatcher, died in August, 1842, when she was less than a year old—that her mother, in April, 1844, married Thomas Davis. The plaintiff was sole heir of her father, whose succession was worth \$16,896, of which \$10,400 was his separate property, and the remainder community. The principal property was a plantation and slaves. Davis took charge of this plantation, made crops, shipped and disposed of them in his own name, bought and sold property, and was the principal manager of Hatcher's estate for near fifteen years. In 1845 he purchased a tract of land of about four hundred acres lying in the parish of East Feliciana, and sold it in 1858 to the defendant. The right of plaintiff to legal mortgage on this land forms the subject of this controversy. Judgment was rendered in the court below in favor of the defendant, and the plaintiff appealed.

The prominent question before us in this case is, has the minor a legal mortgage on the immovable property of his co-tutor as well as on that of his tutor for the faithful discharge of his duties in that capacity?

A solution of this question is not free from difficulty. Our laws in regard to tutorship have been, to a great extent, borrowed from the Code Napoleon of France. The interpretation given in France to the articles of that Code which treat of the co-tutor clearly establish that a tacit or legal mortgage exists upon his property, although it is not so expressly announced by that code; and, although article 2115 of the Code Napoleon declares that "mortgage takes place only in the cases and according to the forms authorized by law," the articles 395 and 396 of that code, and articles 272 and 273 of our Civil Code are in substance the same, except that in article 272 of our code, in addition to rendering the second husband, and the mother who enters into a second marriage without being authorized by a family meeting, to retain the tutorship, responsible *in solidum* for all the consequences of the maladministration of the tutorship, unduly kept by her, declares the estate of the husband tacitly mortgaged as a security for that responsibility.

Article 395 of the Napoleon Code does not declare the estate of the

second husband under legal mortgage. The article 272 of our present code is taken from the Louisiana Code of 1808, title 8, section 2, article 10. But that code has no article analogous to article 395 of the Napoleon Code and to article 273 of our present code. It makes no provision for cases in which second marriages take place *with* the sanction of a family meeting for the retention of the tutorship by the mother after marriage. The compilers of the code of 1825 inserted, after article 272 (identical with the article we have referred to in the code of 1808), the analogous article 396 of the Code Napoleon. The article 273, immediately succeeding the one taken from the old code, article 10, page 60, in which a legal mortgage is declared to exist on the property of the second husband where the marriage takes place without the previous consent of a family meeting, that the mother shall retain the tutorship, is in these words: "When the meeting of the family shall retain the mother in the tutorship, her husband becomes, of necessity, the co-tutor, who, for the administration of the property, subsequently to his marriage, becomes bound jointly with his wife." This article, we see, does not contain the provision of the preceding one relating to the legal mortgage.

It could not have escaped the attention of the eminent jurists who were engaged in the compilation of our present code that by the interpretation given by the courts of France to articles 395 and 396 of the Napoleon Code, a legal mortgage attaches to the property of the co-tutor. Did they, in copying these articles into our code, intend that they should have the same construction here that they have in France? From one point of view it would seem that they did. But we think there are grounds for doubt that such was the intention. The natural tutrix of minor children, contracting a second marriage without the authorization of a family meeting to retain the tutorship, loses it *ipso facto*. She is no longer tutrix, and there cannot be a co-tutor. In such a case the husband is not recognized as a co-tutor. He is rather viewed as a trespasser for assuming the administration of minors' property without legal sanction. The mother is deprived of the right she enjoyed previous to the marriage. Both are jointly made responsible if they unlawfully persist in the administration of the minors' estate, and the property of the new husband is declared under legal mortgage as an additional safeguard against injury to the minors.

The case is different when a council of the family retains the mother in the tutorship after the marriage. The husband is jointly bound with his wife for his proper administration of the property, but his estate is not declared to be, on that account, under legal mortgage. It is a privilege of a natural tutor to be exempt from entering into bond and security. The mother, in that capacity, retains her privilege after a second marriage if the assembly of the minor's relatives accord it to her. The extension of the right is presumed to be given upon the

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confidence of the relatives and friends of the minors in the prudence and integrity of the second husband. He becomes, of necessity, as the law declares, the co-tutor. Being approved by those whom the law clothes with this discretion, it would seem anomalous that he should be placed in a no less onerous condition than the one who assumes a tutorship without authority.

If the co-tutor be in all respects a tutor according to the sense in which the term tutor is understood, and the functions of the co-tutor are equivalent to those of the tutor, then the argument has force that the property of the co-tutor is subjected to legal mortgage, because, by article 3293 of the Civil Code, a legal mortgage exists on the property of tutors in favor of minors.

The functions of the co-tutor would seem to be subordinate, and not of a plenary character. They cannot be performed by separate action on his part, and only conjointly with those of the tutrix. They proceed from and are dependent upon those of the tutrix and cease with them. If the tutrix should die during the tutorship, the functions of the co-tutor would at once terminate. It is not a distinct and separate office independent of any other. It is not enumerated among the different kinds of tutorship of which the code treats, but is merely incidental to one of the four kinds into which tutorship is divided.

In the case of *Fabre v. Hepp*, 7 An. page 7, this court incidentally expressed the opinion that where the tutrix had, previous to her second marriage, been authorized to retain the tutorship, no legal mortgage attached to the property of the co-tutor.

Legal mortgages are *stricti juris*. Article 3280 of the Civil Code is very explicit on the subject. It declares that "no legal mortgage shall exist except in the cases determined by the present code."

We are unable to find that it is any where clearly and distinctly announced by our law that the property of co-tutors is subject to legal mortgage, and must adopt, as our decision, the opinion suggested by our predecessors in the case of *Fabre v. Hepp*.

Entertaining these views, it becomes unnecessary to examine the other points of defense.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both courts.

State of Louisiana ex rel. Board Metropolitan Police v. The Judge of the Sixth District Court for the Parish of Orleans.

**NO. 2448.—STATE OF LOUISIANA ex rel. BOARD METROPOLITAN POLICE
v. THE JUDGE OF THE SIXTH DISTRICT COURT FOR THE PARISH OF
ORLEANS.**

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The judgment referred to in article 575 of the Code of Practice, means a judgment that can be executed under a writ of *feri facias*.

A judgment making a writ of mandamus peremptory, directing a public officer to pay an amount of money in his hands, is not such a judgment as may be executed under a writ of *f. fa.* From such a judgment, the judge *a quo* should grant a suspensive appeal, and fix the amount of the bond, without reference to the amount of the judgment making the writ peremptory.

A PPEAL from the Sixth District Court for the parish of Orleans.
Cooley J. E. Filleul for relator.

Howe, J. The relators aver that J. B. Howard applied to the Sixth District Court for the parish of Orleans for a mandamus directing S. N. Burbank, their treasurer, to pay to Howard the sum of one hundred thousand dollars, amount of Metropolitan Police warrants alleged to be held by him. That Burbank, in contempt of the authority and resolutions of the Board, consented to the issuing of the writ for the sum of seven hundred and thirty-two thousand four hundred and twenty-three dollars, alleged to be held by Howard. That on the same day, the judgment ordering a mandamus to issue was amended, and a mandamus ordered for five hundred and eighty thousand dollars.

They further aver, that such a large amount of warrants have never been exhibited to the Board, or their finance committee; that there is no proof in the record that these warrants have ever been exhibited to the Sixth District Court; that the State Treasurer has in his possession four hundred and ninety thousand three hundred dollars and thirty-five cents of Metropolitan warrants; which amount, added to the sum claimed to be held by Howard, exceeds by many hundreds of thousands of dollars the total amount of warrants issued, not only for the city of New Orleans but for the entire Metropolitan District.

They claimed the right to take a suspensive appeal from this judgment, but the Judge refused to grant such an appeal unless they would furnish a bond in an amount exceeding by one-half the amount which Burbank had been directed to pay, namely, the sum of five hundred and eighty thousand dollars.

The principal reason given for this position by the respondent, is that the judgment in question is a money judgment, and that the suspensive appeal therefrom must be governed by article 575 C. P. and the various amendments thereto.

We find ourselves unable to concur in this view. The money judgment referred to in article 575, we think to be the same one alluded to in article 628, and, more fully, in article 641. It would seem that it is also the judgment referred to in article 3289 C. C., defining the judicial mortgage. It is executed by a writ of *feri facias*. It is, when

State of Louisiana ex rel. Board Metropolitan Police v. The Judge of the Sixth District Court
for the Parish of Orleans.

properly recorded, a mortgage on the real estate of the debtor in the parish of inscription. To render such a judgment in a summary proceeding by mandamus, would be to violate the simplest rules of procedure.

The judgment in this case is an order directed to a public officer to compel him to fulfill what is alleged to be a duty attached to his office. C. P. 834. It is not, strictly speaking, capable of being executed by the sheriff. No writ of possession or of *feri facias* can issue. If the defendant does not choose to obey the order, he may be arrested and imprisoned; but if he chooses to remain in prison, the order will remain unexecuted. C. P. 843.

We are constrained, therefore, to believe that this is a clear case where the amount of the bond should have been fixed by the Judge, but where the law has established no special standard of amount. In such a case, the bond offered by the relators in the sum of five hundred dollars would seem to be amply sufficient, and we think the Judge should have allowed, upon that, a suspensive appeal. *State v. Judge Fourth District Court*, 20 An. 108; *Blanchin v. Fashion*, 10 An. 345.

The case of *State v. Mount*, 21 An. p. —, cited by respondent, does not conflict with the views above expressed. In that case, the appellant, Mount, claimed to be exempted from giving any bond whatever by the law which exempted the city of New Orleans. If he had given a bond like that offered by relators in this case, his appeal would have been maintained.

The same views apply to the other cases in which the relators now before us have sought to take suspensive appeals.

It is therefore ordered, adjudged and decreed, that a peremptory mandamus be issued from this Court directing the Judge of the Sixth District Court for the parish of Orleans to grant to relators herein suspensive appeals in the following cases, upon the relators, the Board of Metropolitan Police, filing, in each of said cases, an appeal bond, with surety, conditioned as the law requires, in the sum of five hundred dollars, viz :

State ex rel. J. B. Howard v. S. N. Burbank, Treasurer, etc., No. 737 of the docket of the Sixth District Court ;

State ex rel. J. Davidson and Hill v. The same, No. 736;

State ex rel. Pugh v. The same, No. 735 ;

State ex rel. Hughes and Dejean v. The same, No. 741 ;

State ex rel. Burbank v. Dubuclet, No. 742.

S. Silverstein, v. S. Stern.

No. 1748.—S. SILVERSTEIN v. S. STERN.

In a suit on a contract of lease, the lessor may show occupancy of the premises, and recover rent for the time, although he fails to establish the contract.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. T. A. Bartlette* for plaintiff and appellee. *Cotton & Levy* for defendant and appellant.

LUDELING, C. J. Solomon Silverstein sued the defendant on an alleged contract of lease. He has failed to prove the contract for the year commencing October, 1867, and ending the thirtieth of September, 1868, as alleged. The evidence satisfies us, however, that defendant occupied the house of plaintiff one month, and that one hundred dollars therefor would be reasonable rent.

It is therefore ordered, that the judgment of the District Court be avoided and reversed; and that there be judgment in favor of the plaintiff against the defendant for one hundred dollars, with five per cent. interest thereon from judicial demand, and costs of the lower court, with privilege upon the property provisionally seized. It is further ordered, that the appellee pay the costs of the appeal.

Rehearing refused.

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No. 2351.—THE STATE OF LOUISIANA ex rel. S. BELDEN, Attorney General, v. MARKEY, KAISER, et al.

A third party, appealing from a judgment, must allege and show a direct pecuniary interest in the subject matter of the suit.

The city of New Orleans has no pecuniary interest in the subject matter of a suit brought under the intrusion act, No. 156 of 1868, to determine the rights of parties to seats as Aldermen and Assistant Aldermen of said city.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. Simcon Belden*, Attorney General, *Wooldridge & Thomas* and *L. A. Sheldon* for relators, appellees. *Cotton & Levy, E. Bermudez* and *J. Livingston* for defendants. *J. R. Beckwith* (City Attorney) for city of New Orleans, appellant.

LUDELING, C. J. The relators have moved to dismiss the appeal taken by the city of New Orleans, on the following, among other grounds, to wit:

That the city is without interest, either pecuniary or otherwise, in the suit.

The law grants the right of appeal to any one, though not a party to the suit, if he have an interest in the subject matter of the suit. C. P. 571.

But he must allege and show that interest; and it must be a *direct, pecuniary* interest. 1 N. S. 308; 4 N. S. 342; 4 N. S. 622; 2 Rob. 391.

The matter at issue is the right to office—whether the relators or

The State of Louisiana ex rel. S. Belden, Attorney General, v. Markey, Kaiser et al.

the defendants are, under the law, entitled to hold the offices of Aldermen and Assistant Aldermen.

In the motion for an appeal, it is alleged "that the city of New Orleans is interested in this suit, in a sum exceeding five hundred dollars." The nature of this interest is not stated.

In the affidavit of the Mayor, accompanying the motion for an appeal, it is alleged "that the city of New Orleans has a large pecuniary interest at stake; that the revenues and property of the city are administered by the Common Council, and that both the property of the city of New Orleans and its revenues are valued for the present year at over several millions of dollars, and, by law, placed under the control of the Council, and would be under the control of W. R. Fish and the other informers, if said parties were permitted to exercise the duties, and to occupy the seats of Aldermen and Assistant Aldermen, in the Common Council of said city of New Orleans. Defendant further says that the city of New Orleans is a political corporation duly chartered by law; that said city is interested in this suit in a sum exceeding five hundred dollars, and that it is aggrieved by the interlocutory orders and the final judgment herein rendered," etc.

We have examined the record in vain to ascertain what the pecuniary interest of the city, in this suit, is.

What is decided against *the city* in this suit? What can be decided in her favor on appeal?

How can *any pecuniary* interest be said to be involved in this case, where there are neither salaries, fees nor perquisites attached to the offices of Aldermen and Assistant Aldermen, which are the subjects of the suit?

But whether there can be any pecuniary value attached to said offices or not, it is clear *the city* has no direct pecuniary interest in the suit.

It has been decided that, in a suit for something which has an appreciable money value, the oath of the appellant may supply the omission of evidence as to the *value of the thing in controversy*.

But we are not prepared to say that the mere affidavit of any one, that he is interested in a suit between other parties, will authorize an appeal by him. We had occasion to decide otherwise in the suit of Samuel Johnson v. The City of New Orleans, on an application of the French Society for charity and mutual relief, to compel the Judge of the Sixth District Court to grant them an appeal. 2 R. 391; 4 N. S. 342.

The Court will notice, *ex officio*, that there is no order of appeal in favor of the defendants. They did not ask for an order of appeal; the fault is imputable to them. 2 An. 752; 5 An. 666; 20 An. 193.

It is ordered that this appeal be dismissed at the cost of the appellant.

Rehearing refused.

Mrs. George W. Pritchard v. A. J. Parker. A. J. Gaudin, Intervenor.

No. 2358.—MRS. GEORGE W. PRITCHARD v. A. J. PARKER. A. J. GAUDIN, Intervenor.

An allegation of damages, unsupported by evidence on trial in the court below, will not be considered in estimating the amount in controversy necessary to give the appellate court jurisdiction.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. McGloin & Kleinpeter*, for plaintiff and appellee. *G. Fernandez*, for intervenor, appellant.

TALIAFERRO, J. The plaintiff and appellee moves to dismiss the appeal in this case on the following grounds:

1. That the intervenor, who appeals, has fictitiously set up a claim of two hundred dollars damages, in order to show, together with the amount in dispute (four hundred and fifty dollars), a sum sufficiently large to entitle him to appeal.

2. Appellant has not pointed out in his motion those he intends to make appellees.

3. Danflons, the bondsman of intervenor upon the injunction bond, and condemned *in solido* with him in damages, has not been made a party.

4. There is no one before this court as appellee.

5. Danflons, the surety on the injunction bond, is surety on the appeal bond, and, therefore, the appeal bond is insufficient.

6. This appeal was taken by motion in open court. The judge has failed to fix the amount of the security, nor caused the same to be entered on the minutes of the court.

The intervenor claims a piano seized among the furniture of the defendant. He alleges the piano to be worth four hundred and fifty dollars, and claims two hundred dollars damages caused him by the alleged illegal seizure. He has made no effort whatever to prove damages to any amount. We can but consider the amount of damages in this case as a subterfuge and evasion, resorted to to give this court jurisdiction of a case which, legally and constitutionally, it does not possess.

Entertaining this view of the case, it is unnecessary to examine the other points in the motion to dismiss. See 9 An. p. 3; 10 An. 282; 16 L. R. 182; 4 An. 213; 6 An. 735.

It is therefore ordered, that this appeal be dismissed at the cost of appellant.

Mary A. Nugent v. Jotham Potter et al.

No. 1750.—MARY A. NUGENT v. JOTHAM POTTER et al.

Where a third party pays a judgment to the attorney of the judgment creditor under a writ of *scire facias*, and takes an order of court where the judgment was rendered, on the motion of the attorney, subrogating him to all the rights of the judgment creditor in the judgment, he becomes legally subrogated thereto, and conventional subrogation takes place by the act of the attorney.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. T. A. Bartlette and Frank Haynes*, for plaintiff and appellee. *C. Roselius & Alfred Phillips*, for defendant and appellant.

TALIAFERRO, J. The defendant Potter appeals from a judgment of the lower court perpetuating an injunction sued out by the plaintiff to restrain him from selling property of hers seized by him under an execution issued on a judgment rendered in favor of *Josephine Lacoste v. Mary A. Nugent*, to all the rights under which judgment Potter claimed to be subrogated.

The plaintiff contends that the defendant has no subrogation as he alleges, to the rights of Mrs. Lacoste in the judgment, and that he paid the judgment with money owing to P. S. Nugent by the city of New Orleans; that the payment thus made to Mrs. Lacoste extinguished the debt, and that the plaintiff is no longer liable for it.

The facts as we find them seem to be that on the twentieth of July, 1865, Patrick Nugent entered into a contract with the city of New Orleans to lay pipe along several streets, designated in the agreement. Two days afterwards Potter and Nugent entered into a contract of partnership to fulfill this engagement—Potter to furnish the funds necessary for the work, and to be reimbursed out of the first payment made by the city on the contract with Potter. A notification of the partnership contract between Nugent and Potter was made to the city authorities.

We find that in September, 1866, a certified copy by the City Surveyor, signed by the financial committee, was issued to Nugent, that there was due him on his contract with the city five thousand seven hundred and eighty-eight dollars. This sum due Nugent by the city was seized by Mrs. Lacoste under execution issued on her judgment against Mary A. Nugent. Potter paid the amount of this judgment to the attorney of Mrs. Lacoste and took an order of court, on the motion of the attorney, subrogating Potter to all the rights of Mrs. Lacoste under the judgment.

Potter contends that he is legally subrogated to all the rights of the judgment creditor, and that he is also subrogated by the act of the attorney of that creditor.

It is contended by the plaintiff in this case that the act of subrogation intended by the attorney was posterior to the payment; that, in fact, there was merely a receipt given to Potter for the money paid, without any thing then stated showing the intention to subrogate him

Mary A. Nugent v. Jotham Potter et al.

to the rights of the judgment creditor, and also that the attorney was without authority to make the subrogation, and on the last ground the case in 8 N. S. page 571, is relied upon.

The position taken by the plaintiff is hardly borne out by the evidence. The attorney, as a witness on the part of the defendant, said, in answer to the interrogatory, "was the agreement between you and Potter reduced to writing?" "No, sir, the only writing is what we wrote in court, which is the subrogation and the receipt which I gave him; that is the only agreement we ever had about it."

We think it clearly established that there was conventional subrogation in this case. The attorney's statement that the payment and act of subrogation were made at the same time is sufficiently explicit and he swears he was authorized by his client to do the act.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that the injunction sued out in this case be dissolved, and that the defendant have and recover, *in solido*, from the plaintiff in injunction and Dennis Cronan, her surety on the injunction bond, two hundred and fifty dollars as damages. The plaintiff and appellee paying costs in both courts.

Rehearing refused.

No. 1927.—Succession of GEORGE WELLING—On opposition of ELIZA A. DARNEAL and children.

The assets of a partnership of which the deceased was a member cannot be made liable for the privileged claim of one thousand dollars allowed by the statute of 1852 to the widow and heirs of the deceased partner, until the debts of the partnership are paid and a division of the assets are made between the partners. The decision in the succession of Cyrus W. Stauffer (*ante* page 520), reaffirmed.

APPEAL from the Second District Court, parish of Orleans. *Duvigneaud, J. C. Roselius & Alfred Phillips*, for administrator, appellant. *Cotton & Levy*, for widow and heirs, appellees.

LUDELING, C. J. The appellees oppose the account of the administrator and claim the benefit of the homestead act of 1852, which grants to the widow or legal representative of the children of the deceased one thousand dollars out of his succession, if they be in necessitous circumstances.

The deceased left *individual* property which realized *one hundred and twenty-two dollars and forty-nine cents*. This was absorbed by the privileged debts *due by the succession*.

The fund now sought to be distributed arises from *partnership* property. The individual members of the firm have only a residuary interest after the copartnership creditors have been paid, and the firm being insolvent, no part of these funds entered into the succession.

Succession of George Welling—On opposition of Eliza A. Darneal and children.

We had occasion to decide this recently in the succession of Cyrus W. Stauffer. 21 An. 520.

For the reasons stated in that case, it is ordered that the judgment of the District Court recognizing the claim of Eliza A. Darneal and children as a privileged claim be avoided and reversed, and it is ordered that their opposition be dismissed with costs in both courts.

Mr. Justice Wyly dissenting. See dissenting opinion in the succession of Cyrus W. Stauffer published at page 604 of these reports.

NO. 1718.—MEGIBBEN & BROTHER v. J. MOORE WILLSON.

A verbal promise to pay a promissory note after prescription has accrued, will not work an interruption of prescription. To establish the interruption, the evidence must show that the promise was made before prescription was acquired.

After a note is prescribed, only written evidence is admissible to prove a renunciation. Acts of 1858, No. 208.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J.' George L. Bright*, for plaintiffs and appellants. *Hornor & Benedict*, for defendant and appellee.

WYLY, J. This suit is to recover the amount of two promissory notes. The defense is general denial and the prescription of five years.

The notes matured on first April and first June, 1861. The defendant was cited on sixteenth April, 1867.

The witness John Henderson testified that the defendant Willson was absent in the Confederate lines during the whole war, returning here in 1866. "When he returned I asked him to pay the two notes. He promised to pay them, and regretted that he had not done so before he left in Confederate money. That was, I think, in 1866."

This is the only evidence in the record to establish the renunciation of prescription, which had accrued before the action was instituted. The notes were upon their faces prescribed, presumed paid; and to recover, it was incumbent on plaintiff to overcome this presumption by proof of interruption of prescription before it had accrued, or by legal proof of the renunciation thereof after it had accrued.

The last of the notes was prescribed on first June, 1866. Plaintiff has not proved an acknowledgment or any interruption of prescription prior to that period. The evidence of the witness Henderson, who thought it was in the year 1866 he conversed with the defendant, and he promised to pay the notes, etc., does not establish with certainty the interruption of prescription or acknowledgment of the claim before the period of prescription had arrived. The conversation to which the witness alludes, if it really occurred in 1866, as he thinks, might have occurred after the first June.

The verbal promise to pay after the lapse of the period of prescription, did not operate a renunciation thereof.

Megibben & Brother v. J. Moore Willson.

The fourth section of act No. 208, of the act of 1858, declares parol evidence inadmissible to prove a promise to pay a written obligation, when prescription has already accrued. 14 An. 27.

Therefore, evidence of the character offered in this case cannot establish the renunciation of the prescription of the notes. It did not establish an interruption, because it did not prove the verbal promise to pay occurred prior to the lapse of the period of prescription.

It is therefore ordered, that the judgment of the court *a qua*, dismissing the demand of plaintiff, be affirmed with costs.

No. 1783.—BURKE & Co. v. EDEY & PINCKARD, etc. WILLIAM GOLDING, appellant.

Objections to the reception of testimony on trial in the lower court will not be noticed in the appellate court, unless the objections are embodied in a bill of exceptions to the ruling of the judge admitting the evidence.

When the appeal is taken for delay only, damages will be given against the appellant for frivolous appeal.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. George W. Christy*, for plaintiff and appellee. *W. H. Hunt and E. C. Whitney*, for defendant and appellant.

Howe, J. William Golding has appealed from a judgment rendered against him as indorser of a promissory note. Upon the trial his counsel objected to certain testimony, but reserved no bill of exceptions to the ruling of the Judge admitting the same. The objection cannot be noticed. *Succession of Prevost*, 4 An. 347; *West v. his creditors*, 4 An. 447; *Gray v. Thomas*, 18 An. 412.

The appeal seems to be frivolous, and to have been taken for delay merely.

It is therefore ordered, that the judgment appealed from be affirmed with costs, and with ten per cent. damages for frivolous appeal.

No. 1757.—FRANCIS WILLIS v. FREDERIKA KERN, Widow of JOHN RUB.

In a suit to enforce a written notarial contract of sale, the certificate of marriage is admissible to show that the vendor is a married woman, and where the notarial act is alleged to have been procured by fraudulent and deceptive practices, its declarations may be contradicted by parol testimony. 2 An. 92, 458, 908; 4 R. 508.

The husband cannot be a witness for or against his wife in a litigation to which she is a party. Acts of 1867, p. 269.

The dying declarations of a party who acted as interpreter for the vendor at the passage of a notarial act of sale, are not admissible in evidence on the trial of a suit to enforce the contract.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. B. Egan and L. Madison Day*, for plaintiff and appellant. *Dalsheimer & Buck*, for defendant and appellee.

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Francis Willis v. Frederika Kern, Widow of John Bush.

LUDELING, C. J. This is a petitory action to recover a lot of ground with improvements and rents. The defendant admits that she is in possession of the property, but avers that she is the owner thereof. She avers, further, that her signature to the act was obtained through fraud and deceit; that she believed she was making a testament at the time the act under which the plaintiff now claims was signed; that there was no price or consideration given for the property; and that at the time she signed the act she was a married woman, and was unauthorized to contract without the authorization of her husband, or, in his absence, of the judge.

The plaintiff took five bills of exceptions during the course of the trial.

The first is to the admission of a certificate of marriage, to show that the defendant was a married woman. The evidence was properly received. The second and third bills taken were to the exception of the testimony of Charles Klar, on the ground that a husband cannot testify in favor of or against his wife. The evidence should have been excluded. Act of 1867, p. 269; art. 2260 C. C.

The fourth bill of exceptions was to permitting the defendant to prove that she was a married woman, because she would thereby contradict her declarations in a notarial act.

The defense set up in this case is that this notarial act was procured through fraud and deception; that she intended to make a testament; whereas, this act was imposed on her instead by the machinations of the plaintiff and the person who acted as interpreter between defendant and the notary.

Under these circumstances, it was proper to permit the defendant to prove that the declarations in the act were untrue. She could have made a will without the authorization of her husband, but not a sale. 4 La. 352; 6 La. 258; 19 La. 431; 2 An. 92, 458, 908; 4 R. 508; Greenl. Evidence § 284.

The fifth bill of exceptions is to the admissibility of the testimony of Alexandre Drete as to the dying declarations of Mrs. Leidinger, who acted as interpreter for the defendant at the notary's, when the act in question was passed, on the ground that it is hearsay evidence.

The objection should have been sustained. Greenleaf Ev. § 156.

The evidence in the record proves that, at the date of the act of sale under which the plaintiff claims, the defendant was a married woman; that she was unauthorized by her husband or the judge to make the sale; that she intended to make, and believed she had made a will, when she signed the act of sale, and that her signature to the act was procured by fraud and deceit.

It is therefore ordered and adjudged, that the judgment of the district judge be affirmed, with the costs of appeal.

Rehearing refused.

No. 2062.—STATE OF LOUISIANA v. A. CASSARD.

State warrants drawn by the Auditor of Public Accounts are receivable in payment of taxes or licenses and a party depositing them with the collector is exempt from the payment of interest, costs or damages from the date of such deposit. Act No. 1 of 1869.

APPEAL from the Seventh District Court for the parish of Orleans. *Collens, J. Breaux & Fenner*, for plaintiff and appellee. *H. C. Dibble*, for defendant and appellant.

HOWELL, J. The defendant having been sued for the tax on his occupation for the year 1868, deposited in court the amount thereof in certificates of indebtedness of the State of Louisiana and also in warrants of the Auditor on the State Treasurer, and asked the court to order the tax collector to receive one or the other in full discharge of the demand. The District Judge refused his prayer and rendered judgment against him for the sum claimed, and he has appealed.

It has been settled in the case of the City National Bank v. F. C. Mahan, just decided, that these "certificates" are bills of credit, emitted by the State in violation of section 10, article 1, of the Federal Constitution, and therefore illegal.

As to the warrants, act No. 1 of the Legislature of 1869, passed after the institution of this suit, authorized and required the tax collectors to receive in payment of the taxes due the State all warrants issued or to be issued by the Auditor, and the deposit in this case of the warrants may be deemed as made at the date of said law.

It is therefore ordered that the judgment appealed from be reversed, and that there be judgment in favor of defendant authorizing and requiring F. C. Mahan, tax collector, and representing the State herein, to receive in payment of the license tax herein sued for the warrants deposited by the defendant in the lower court. The defendants to pay the costs up to the fourth January, 1869, as the date of his deposit.

No. 2038.—CITY NATIONAL BANK v. F. C. MAHAN, State Tax Collector.

The title of the act of the General Assembly approved eleventh of July, 1868, entitled "An Act relative to the finances of the State," is sufficiently explicit to embrace the objects of the statute. The title of a law is not to be strictly construed; Neither is the above quoted act retroactive in its effect.

The certificates of indebtedness or notes authorized by the act of the General Assembly, approved ninth of February, 1866, are bills of credit and are issued in violation of section 10, of article 1. of the Constitution of the United States.

These certificates of indebtedness or bills of credit having been issued in violation of the prohibitions in the constitution of the United States, are not receivable for taxes or other public dues to the State.

The act of the General Assembly approved ninth of February, 1866, entitled "An Act to authorize the issue of certificates of indebtedness, and of bonds for the funding of the same," is in conflict with article 1, section 10, of the Constitution of the United States, and is therefore void.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. James B. Eustis and C. B. Buddecke*, for plaintiff and appellant. *Simeon Belden*, Attorney General, *H. C. Dibble* and *J. B. Robertson*, for defendant and appellee.

City National Bank v. F. C. Mahan, State Tax Collector.

LUDELING, C. J. The plaintiff obtained an injunction to restrain the tax collector from selling his property to pay thirteen hundred and sixty-five dollars and twenty-five cents, in United States currency. He alleges that, by virtue of an act of the General Assembly of the State of Louisiana, approved ninth February, 1866, the State of Louisiana issued certain notes, and made them receivable in payment of all debts due to the State. That he has offered to pay to the collector the amount of his taxes with said notes, but that the collector refuses to receive them, and demands payment in United States currency in conformity with the provisions of the act entitled "An Act relative to the finances of the State," approved eleventh July, 1868. The City National Bank alleges that this act is unconstitutional because its title does not indicate its object: because it is retroactive in its effects; because it violates section 1, article 10 of the Constitution of the United States, by impairing the obligation of the contract created by the act of February, 1866.

It is urged in this court in addition to the grounds above stated why the injunction should be perpetuated, that the act, by virtue of which the collector seized, and was proceeding to sell, the property of plaintiff, is unconstitutional, because it confers executive and judicial powers on the collector. We are not prepared to say that the act entitled "an act relative to the finances of the State" is obnoxious to the provisions of article 114 of the constitution of this State. The title might have indicated more exactly the object of the law, "but the title of a law is not to be strictly construed; if it state the object according the understanding of reasonable men, it satisfies the constitution." 6 An. 605. Neither is the law retroactive. *Frellsen v. Mahan*, tax collector. 21 An. 102.

But if the act approved ninth February, 1866, be valid, the plaintiff had the right to pay the taxes due by him to the State of Louisiana with the notes or bills issued under that act. It declares that "the said certificates shall be payable twelve months after date, without interest, and receivable for all State taxes or other public dues, as well as for the sale of public lands." Section 2, acts of 1866, page 8.

The effect of the act of 1868, before mentioned, if enforced, will be to impair the obligation of the State, created by the act of 1866.

We must, therefore, determine the question raised by the defendant, whether or not the act entitled "An Act to authorize the issue of certificates of indebtedness and of bonds for the funding of the same," passed in 1866, is valid—for "the courts will not lend their aid to enforce a contract, or give effect to a law, founded upon a violation of the Constitution."

The language of the Constitution of the United States is "no State shall emit bills of credit." Article 1, section 10.

In the case of *Craig et al. v. The State of Missouri*, the Supreme

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Court of the United States said "bills of credit signify a paper medium, intended to circulate between individuals and between government and individuals, for the ordinary purposes of society." In *Briscoe v. Bank of the Commonwealth of Kentucky* (11 Peters 315), the Supreme Court said "The definition then, which does include all classes of bills of credit emitted by the colonies or States, is a *paper issue by the sovereign power, containing a pledge of its faith, and designed to circulate as money.*" This definition was approved of by the same court in *Darrington v. The State Bank of Alabama*. 13 Howard 17.

Both of these definitions embrace the certificates in question.

They were issued by the State.

Section 1 of the act of 1866 provides "that it shall be the duty of the Governor, and he is hereby empowered to issue, *on behalf the State*, from time to time, for the purpose of *paying* the current expenses of the State, in accordance with appropriations therefor, according to law, *a sum not exceeding* two millions of dollars in certificates of indebtedness."

That they were issued on the faith of the State is apparent on the face of the certificates :

"NEW ORLEANS, LOUISIANA, May 23, 1866.

It is hereby certified that five dollars is due *by the State of Louisiana* to bearer, and the State Treasurer is hereby directed to pay the same twelve months after date.

(Signed)

"H. PERALTA, Auditor.

"Approved :

ADAM GIFFEN, Treasurer."

Indorsement—"This certificate is receivable in *payment* of all State dues and for sale of public lands, and is fundable, at the option of the holder, in State bonds bearing six per cent. interest per annum, payable semi-annually, in accordance with the provisions of an act of the Legislature approved ninth February, 1866."

That they were designed to circulate as money is manifested by the act of the Legislature as well as by the certificates themselves.

The act aforesaid declares the certificates are to be issued "for the purpose of *paying* the current expenses of the State." Section two declares "that the Governor shall determine the denomination and form of the certificates, that they shall be printed and engraved under his direction and control, etc., and that they shall be receivable for all State taxes or other public dues, as well as for *the sale* of public lands." They were issued in sums of five, ten and twenty dollars in the similitude of ordinary bank bills, and they were actually circulated as money

We are constrained, therefore, to declare that said certificates were bills of credit, and that the act number five of the General Assembly

of the State of Louisiana, entitled "An Act to authorize the issue of certificates of indebtedness and of bonds for the funding of the same," is null and void, being in contravention of section ten of article one of the Constitution of the United States.

We deem it not improper to remark that, by the act No. 114, of 1868, the General Assembly of the State has provided for the redemption of these State notes by the imposition of the one per cent. tax for which they are made receivable.

It is therefore ordered and adjudged that the judgment of the District Court be affirmed with costs of appeal.

NO. 1780.—JUAN GARCIA Y MORA v. JOHN C. KUZAC et als.

Under the act of March 29, 1865, the Fourth District Court of New Orleans was without jurisdiction to issue an injunction against the execution of a judgment of a justice of the peace, the Third District Court of New Orleans having exclusive jurisdiction over such cases by this act.

The institution of a suit in a court that has no jurisdiction is null, and the subsequent investiture of jurisdiction will not cure the nullity.

A PPEAL from the Fourth District Court of New Orleans. *Théard, J. Collens & Wooldridge*, for plaintiff and appellant. *C. E. Schmidt and John H. Rees*, for defendants and appellees.

TALIAFERRO, J. For an alleged illegal and vexatious seizure and advertisement of sale of the plaintiff's stock of merchandise by the defendant, acting as constable of the Second Justice of the Peace of New Orleans, and under color of a *fieri facias* issued on a judgment rendered by said second justice in a suit entitled *H. Blaize & Co. v. Canales*, the plaintiff sued out a writ of injunction staying the proceedings complained of, and praying against the seizing creditors, *Blaize & Co.*, judgment for one thousand dollars as damages. This injunction suit of the plaintiff was brought in the Fourth District Court, the petition being filed on the tenth of February, 1868. The defendants excepted to the jurisdiction of the court, and the exception was sustained, the injunction dissolved and the suit dismissed.

From this judgment the plaintiff appeals.

This suit was commenced prior to the adoption of the present Constitution, and by the law in force at that time the Third District Court of New Orleans had exclusive jurisdiction of cases of this kind. For by the act approved March 29, 1865 (Acts of 1864 and 1865, p. 84, sec. 10), it was provided that "in all cases where a party shall have cause to complain of any judgment by a justice of the peace, or act of any constable of a justice of the peace or his deputies, and shall think proper to apply to a higher court for relief, by writs of injunction, mandamus, sequestration, action of nullity, or otherwise, it shall be to this court only that he shall apply for relief."

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But it is contended on the part of the appellant that since the trial of the case in the court below, that court or its successor, the present Fourth District Court, has become vested with jurisdiction of the case, and the Third District Court or its successor deprived of all jurisdiction except that of appeals from justices of the peace, and therefore it would be vain to dismiss this suit.

We do not concur in this view of the case. The institution of a suit in a court without jurisdiction is null, and the investiture of that court with jurisdiction at a subsequent period has no effect to cure that nullity. We think the suit was properly dismissed.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, the appellant paying costs in both courts.

No. 2449.—STATE OF LOUISIANA ex rel. WILLIAM A. FRERET v. GEO. M. WICKLIFFE, Auditor, etc.

The appeal will be dismissed when the failure to make proper parties to the appeal is imputable to the appellant.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. A. & M. Voorhies*, for relator, appellee. *S. Belden*, Attorney General, for defendant and appellant.

HOWE, J. A motion has been made to dismiss the appeal taken herein by the State, a third party interested, on the ground that the defendant in the judgment has not been made a party appellee. The appeal was taken by petition of the Attorney General, which prayed that the relator be cited, but contained no prayer for the citation of the defendant. The necessary parties not being before us, and this defect being the fault of the appellant, it is ordered that the appeal herein be dismissed.

No. 2366.—STATE OF LOUISIANA ex rel. JAMES P. SULLIVAN et als., v. WILLIAM S. MOUNT et als. N. C. KENDALL, appellant.

In a controversy for office under the intrusion act, a third party, not holding or claiming the office in dispute, cannot appeal from the judgment of the court *a qua*.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. Billings & Hughes* and *C. S. Rice*, for appellant. *H. D. Ogden* and *A. & M. Voorhies*, for appellees.

WYLY, J. The Attorney General, on the information of James P.

State of Louisiana ex rel. James P. Sullivan et al., v. William S. Mount et al. N. C. Kendall, appellant.

Sullivan and others claiming to be members of the "Board of School Directors for the city of New Orleans," under act of tenth March, 1868, instituted this proceeding against the defendants under act No. 156 of the acts of 1868; commonly known as the "intrusion act," alleging that the defendants have intruded into or unlawfully hold and exercise the office of "Board of Directors of the Public Schools of the city of New Orleans," which said office it is averred belongs to said informers, James P. Sullivan and others, together with all the books, papers and other property pertaining thereto. The court *a qua* gave judgment for the defendants, from which plaintiff took no appeal. N. C. Kendall, however, claiming to be the secretary of the "Board of School Directors of the city of New Orleans," organized under the act of tenth March, 1869, took a devolutive appeal, alleging that his salary is \$1800 per annum, "and that he has an interest of more than five hundred dollars pending on the result of this suit."

The case is now presented on a motion to dismiss the appeal on various grounds; the most important ones seem to be, viz:

First—The want of jurisdiction, the matter in dispute not exceeding five hundred dollars, and appellant's interest in the matter in dispute not exceeding five hundred dollars.

Second—That as the proceeding is by the State under the "intrusion act," no appeal can be taken by N. C. Kendall, a third person.

It is quite evident that the motion to dismiss is well taken.

What is the matter in dispute?

It is the office of School Directors, and books and papers and other property pertaining thereto.

To these the appellant sets up no claim whatever.

His office, secretary of the board, is not in dispute.

From his own statements we cannot perceive that he has any interest whatever in the matter.

It is therefore ordered that this appeal be dismissed at appellant's costs.

No. 2362.—JOHN MARKS & CO. v. S. HERMAN.

The appeal bond must be made payable to the clerk of the court from which the appeal is taken. The appeal will be dismissed if the bond is not so taken.

APPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. Cotton & Levy*, for plaintiffs and appellees. *Cooley & Phillips*, for defendant and appellant.

HOWELL, J. A motion is made to dismiss the appeal in this case on the ground that the appeal bond is not made in favor of the clerk of the court, as the law requires.

John Marks & Co. v. S. Herman.

The motion must prevail. Art. 575 C. P. as it now exists, requires that "appeal bonds, in all cases of appeals, shall be made payable to the clerk of the court which rendered the judgment appealed from," and gives any appellee interested in the appeal *recourse on such bond* against the appellant and his securities.

There is no room for construction. The bond in every appeal must be made payable to the clerk. If not made payable to him, as in this case, the bond is not such as the law prescribes.

It is therefore ordered that the appeal herein be dismissed with costs.

No. 2473.—R. S. SANDIDGE v. J. S. SANDERSON, and J. S. SANDERSON v. R. S. SANDIDGE. (Cumulated.)

Where a contract of sale of land, slaves and personal property was made for part cash and part credit, for which promissory notes were executed by the purchaser, due at different periods of time before emancipation, and a portion of the notes for the credit price have been paid, the purchaser of the property for which the notes were executed, is only bound to pay that portion of the outstanding notes after emancipation which is found to be due on the land and personal property, in the proportion of the value of the land, slaves and personal property in the original contract of sale.

The holder of a mixed obligation, the consideration of which is part land and part slaves, can not recover that portion for which slaves formed the consideration. Constitution, art. 128.

APPEAL from the Tenth Judicial District Court for the parish of Bossier. *Weems, J. Nutt & Leonard*, for plaintiff and appellee. *S. T. & A. D. Land, Griffin & Snyder*, for defendant and appellant.

WYLY, J. In 1858 Sandidge sold to Sanderson a certain tract of land, personal property and slaves for the price of \$18,000, estimating the land and movables at \$9000, and the value of the slaves also at \$9000. The purchaser paid \$6000 cash, and gave his four several promissory notes for \$3000 each, bearing interest, in evidence of the balance of the price, securing the payment thereof by special mortgage on the land and slaves.

All of said notes were subsequently paid to the vendor, except the last one, which became due on first May, 1862. This last installment is the subject of the present litigation. Upon it Sandidge sued out an order of seizure and sale; and Sanderson enjoined it upon various grounds. The most serious one is the alleged failure of consideration by reason of emancipation. Plaintiff in injunction contends that he has already paid far more than the value of the land and personal property which was only estimated at \$9000. That, having already paid \$15,000, if he is compelled to pay the last installment of \$3000, or any part thereof, he will be compelled by the court to discharge an obligation for the sale of persons, in contravention of article 128 of the Constitution of this State.

The subsequent transactions, partnerships and amicable partition by notarial act between the parties to this litigation did not embrace the

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note involved in this suit and did not discharge the obligation. We therefore deem it unnecessary to enter upon the discussion of matters which, from the evidence, appear to be irrelevant to the main issue presented in this case.

At the time of the proclamation of emancipation there existed a legal obligation evidenced by the note for \$3000, upon which this suit is founded. It was for the balance due by Sanderson to Sandidge for the purchase of land, personal property and slaves. It was the deferred payment, one of the installments evidenced by note given at the time of the sale in 1858. If that note had been for slaves pure and simple, there would be no question that the obligation would be considered discharged, or at least could not be enforced by reason of emancipation and article 128 of the State Constitution. But what is the character or consideration of that obligation, regarding it as one of the installments, deferred payments, of the whole debt?

The debt was half for slaves, half for land and movables. There were four notes issued. Can we say any one of the notes was specially intended to represent the debt for the slaves? Did the parties designate that certain notes were for slaves and certain others for lands? If so, the question might stand on a different basis.

The consideration of the debt was mixed. It was divided into convenient installments without designating the consideration of either of the notes. Can we now say that the three notes paid before emancipation were for the land and personal property, and that the remaining one, now in suit, was purely in evidence of the slave part of the debt?

In other words, shall we now make for the parties an imputation of the payments made before the rebellion, when it is perfectly evident that no special imputation nor any imputation whatever was intended by the parties? The payments made prior to emancipation were simply in discharge of the whole debt *pro tanto*. The original obligation had been so far discharged that Sanderson only owed Sandidge a debt of \$3000 for land, movables and slaves, the value of the slaves making up half the debt. The relation of the parties was just the same as if Sanderson owned all the property except one undivided share for which he owed Sandidge the \$3000. The doctrine of imputation has no bearing on the case. It must be made by the parties or by the law in force at the time of payment. It was not made by the parties, and the law in force at the time recognized the validity of a slave consideration.

Under the then existing law, the slave was as valid an object of a contract as any other. The purchaser, when he paid the \$6000 and made the notes, and afterward paid them all but the one in suit, did so in discharge of his obligation for the slaves as well as the land. He had contracted an obligation for them both; and he undoubtedly

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intended to make the payment and did make the payment as a *pro tanto* discharge of the whole debt.

In the midst of a great rebellion, jeopardizing the life of the nation, the sovereignty of the United States demanded emancipation. The slave was taken for a soldier to fight its battles and maintain its paramount authority. A great public emergency thus destroyed slavery, the object, in whole or in part, of numerous unexecuted contracts in this State. In organizing government under the reconstruction acts, the sovereign power of this State took into consideration the equity existing between debtor and creditor in the slave contracts remaining unexecuted, and it imbedded in fundamental law a perpetual inhibition against the enforcements of contracts of that character by the courts of this State.

Whether emancipation by the paramount authority of the United States discharged the obligations for slaves or not, the remedy or power to enforce them has been withheld from the courts of this State.

We do not think the plea of failure of consideration by eviction or the doctrine of warranty has any application to this case. Eviction by emancipation is not such failure of consideration as the vendor was bound to warrant against. In the contract of sale the clause "warranted slaves for life" meant that they were such by the laws in force at the time and not *statu liberi*. It would be beyond the power of the vendor to warrant against superior force or the acts of the sovereign.

In our opinion the doctrine of immorality is also inapplicable. The validity of the contract must be measured by the law in force at the time of its inception. Slaves were lawful objects of contracts in 1858, when the one under consideration was made, and we can not, with propriety, now say that that which was at the time lawful has tainted the contract with immorality. The morality of a contract, as well as its legality, must be tested by the laws in force at the time it was made. If the contract was then moral it could not be rendered immoral by subsequent laws. Laws provide only for the future. They govern and regulate contracts made after their enactment. Payments made prior to the rebellion, if there be legal imputation, must be imputed by the laws in force at the time. Their imputation can not be regulated by posterior laws. Our laws, now prohibiting the sale of persons, and making it immoral, can not apply as tests of morality to contracts of the past, nor can they regulate the imputation of payments made prior to the rebellion. The title to the slaves was then no more precarious than that to the land. The slave part of the consideration was then no more immoral than the other part of the consideration. The slave part of the debt was as binding and obligatory as the part for the land and movables. Hence the law at the time made no imputation whatever.

We deem it useless to discuss the question whether emancipation

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discharged obligations for slaves or not. Article 128 of the Constitution prohibits the courts of this State from enforcing them.

The main question for consideration is, how shall we apply the prohibitory clause of the Constitution to contracts of the character presented in this case, where the consideration was mixed, part slaves and part land and movables?

Shall we refuse to enforce the whole debt, or shall we only refuse to enforce the slave part of the debt? The prohibitory clause of the Constitution should be construed strictly. We can only refuse to enforce the slave part of the debt. The debt was originally half for slaves and half for other property. The payments prior to the rebellion can not fairly be imputed to that part of the debt for land and movables. We can not presume the parties intended to apply payments to the amount of \$15,000 to that part of the debt which was only \$9000. The payments were obviously made in discharge of the whole debt *pro tanto*. The remaining note on which this suit is based therefore evidences a debt the consideration of which was half slaves and half land and movables. We are of opinion that the plaintiff, Sandidge, should have judgment against the defendant, Sanderson, for half the amount of his demand, and that his mortgage should be recognized and rendered executory.

It is therefore ordered that the judgment of the court below, decreeing to plaintiff the full amount of his demand, be avoided and reversed; and it is now ordered that the plaintiff, Richard S. Sandidge, recover judgment against the defendant, James S. Sanderson, in the sum of fifteen hundred dollars with eight per cent. per annum interest thereon from the sixteenth January, 1858, subject to a credit of one hundred dollars, paid on second March, 1863. It is further ordered that the mortgage herein be recognized and rendered executory on the following described lands to wit: The northeast and southwest quarters of the northeast quarter of section No. 2 in township No. 18, north of range No. 13 west, containing eighty-four and thirty-four one hundredth acres; the southeast quarter of section No. 2, same township and range, containing forty-one and sixty-seven one hundredth acres; the southeast quarter of the southeast quarter of section 35, in township 19, range 13, containing forty acres, and the southwest quarter of section 36, township 19, range 13, containing 160 acres, with all the buildings and improvements thereon. All of said lands being situated in the parish of Bossier and State of Louisiana. That said lands be sold to satisfy the judgment herein and costs hereof. It is further ordered that the plaintiff pay the costs of this appeal.

Justice Taliaferro, concurring:

I concur in the main, in the opinion of the majority of the court.

In resisting the plaintiff's demand, the defendant avers that the con-

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sideration of the notes sued on, being in part for the price of slaves, and to that extent reprobated by law, as being against good morals and public policy, the entire contract is vitiated and consequently null and void. He moreover contends that the payments he has heretofore made under the contract, can only be applied to the value of the land which has thus been paid for, and that there remains nothing due the plaintiff. That as the law repudiates that part of the consideration which relates to the slaves, it will not impute the payments to the price of both land and slaves.

The principles and spirit of the decision in the case of *Wainwright v. Bridges*, 19 An. p. 234, is invoked to sustain the main ground of the defense, and various authorities are cited to show that if any part of the entire consideration of a contract is illegal and against sound morals or public policy, the whole is null.

This doctrine that the nullity arising from the illegality of a part of the consideration of a contract operates the nullity of the whole, is, I imagine, in the general well settled.

"If any part of the *entire* consideration for a promise, or any part of an *entire* promise not in its nature capable of separation, be illegal either by common law or by statute, the whole agreement is void." Chitty on Contracts, page 692.

"A distinction has been taken in the books between a deed or condition void in part by the statute, and the case of such an instrument being in part void at common law. * * * * *

* * * But this distinction cannot be supported; and a contract is void *in toto* if a part of it is illegal either by virtue of a statute or at common law." Chitty on Contracts, page 693.

"There are, however, instances in which the invalidity of a part of a deed, even by virtue of a statute, has been held not to destroy the whole; and the remainder, being legal and distinct, and capable of separation from the illegal provision, has been allowed to stand, there being no express words in the act to render the whole void." *Ibidem*, page 693.

"If any part of the entire consideration of a contract is illegal, as against sound morals or public policy, the whole is void." 6 Dana's Reports, page 91.

"Where the consideration of an agreement is in violation of a statute, no action can be maintained upon it by either party." 17 Massachusetts Reports, page 258.

"An action cannot be sustained in the courts of a State on an agreement entered into in violation of the laws of the United States or of the laws of the particular State." 4 Dallas, page 293.

This general doctrine is recognized in Parsons on Contracts, vol. 1, page 455 *et sequentes*, vol. 2, page 673; 2 Pothier on Obligations, page 16; 9 Iowa Reports, page 384.

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Where, however, the illegal part of the consideration is ascertainable with sufficient certainty, and may be separated from the illegal part, there seems to be no sound reason why the contract should not be enforced to the extent to which the consideration is legal. This principle has often been acted upon.

In the case of *Greenwood v. Curtis*, 6 Mass. Reports, page 358, a contract was entered into on the coast of Africa by which one of the parties, in consideration of a cargo of merchandise received, obligated himself to deliver to the other party one hundred and fifteen slaves. A part only of the slaves were delivered. Upon an account stated, the party in default deducted the estimated value of the slaves delivered, and of certain supplies furnished by him, and acknowledged a balance due in cash. He afterwards gave his note for this balance stated in his account, to be paid in slaves. Being sued subsequently on the account, the court held that the action upon the *insimul computasset* might be maintained, and gave the plaintiff judgment accordingly.

But the rule which vitiates the entire contract, on account of a partial defect in the consideration, seems, in general, to be restricted to and relate more especially to cases where such partial defect arises from a clause or stipulation in the agreement, which is violative of some law existing at the time the contract was entered into. This rule, then, would hardly seem to apply to the case now under consideration; for at the time the contract was made by the parties, there was no law of this State prohibiting the buying and selling of slaves. The fact was distinctly recognized by this court, in the case of *Wainwright v. Bridges*, that, antecedent to the action of the sovereign power abolishing slavery, obligations for the payment of the price of slaves might be and were judicially enforced. Slavery existed, it is true, in violation of natural right, and contracts having for their object the retention of human beings in the condition of involuntary toil and servitude would, in the forum of an enlightened conscience, be adjudged in derogation of sound morals; yet, such contracts had the sanction of the then existing laws or regulations relating to slavery, and the sovereign power then permitted such laws or regulations by not having pronounced against them. So, in the later ages of the Roman empire, there were laws sanctioning slavery and enforcing contracts for the sale of slaves, and still the Digest of Justinian, then in force, expressly declared slavery to be in violation of natural right and natural justice.

Seeing, then, that at the time the parties entered into the contract in relation to the land and slaves, forming the object of the contract, the slaves constituted, to the extent of their value, as valid a part of the consideration as the land. I think the entire contract was not rendered null by reason of the alleged illegality of the sale of the slaves. Nor do I consider that the entire contract is null from the act of the sovereign power annulling, subsequently to the formation of the contract,

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its consideration to the extent of the subsisting unpaid part of the price or value of the slaves.

An insuperable barrier is in the way of the plaintiff's recovering the unpaid price of the slaves, either in whole or in part. This point has been definitely settled and put to rest by the decision, before referred to, of *Wainwright v. Bridges*, and the more authoritative prohibition of article 128 of the State constitution.

I believe it is not out of the power of the parties to ascertain, in cases like the one before us, the portion of the entire consideration to be deducted; at least, that this can be done by an approximation sufficiently near and with sufficient certainty to form the basis of a judgment that will do justice between the parties. With regard to payments made on contracts of this kind before the enforcement of obligations for the price of slaves ceased, equity requires that they should take effect in the manner intended by the parties; that is, as payments on the entire sum stipulated to be paid by the purchaser, as the consideration for which the sale was made. Courts will not deal with the executed parts of these contracts otherwise than the parties themselves have manifestly done. Payments made under the circumstances in view were, beyond all cavil, made *pro tanto* by the debtor for land and slaves, and these payments were received by the creditor in like manner, as far as they went, in satisfaction of the price of land and slaves.

Courts make no imputation of these payments. They accept the disposition which the parties themselves have made of them. Their intention and consent that the payments were made upon the whole price, is patent upon the very face of the act. Even if it were a mere presumption, it would be for the party holding the negative to overcome the presumption, and prove that such was not their purpose. Executory contracts relating to the price of slaves were stricken with nullity by the final action of the sovereign power; but that power went not back upon the dead past, nor authorized the courts to do it; for whatever was paid on such obligations, prior to that final action, there is no reclamation, nor can any other destination be given to such payments than that which the contracting parties themselves have given them. The law in such cases leaves the parties where it found them. It will not hear the absurd plea from one of them that the partial payments made on a contract for land and slaves, were intended to be applied to the price of the land alone. It will give no countenance to the purchaser, who, willing to be relieved from his existing obligations to pay the price of slaves, is yet unwilling to lose what he has paid for them, and desires the seller's land to be given him as an indemnity. Such a litigant is in court with but little grace.

Article 128 of the State constitution declares that "contracts for the

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of the State of Louisiana, entitled "An Act to authorize the issue of certificates of indebtedness and of bonds for the funding of the same," is null and void, being in contravention of section ten of article one of the Constitution of the United States.

We deem it not improper to remark that, by the act No. 114, of 1868, the General Assembly of the State has provided for the redemption of these State notes by the imposition of the one per cent. tax for which they are made receivable.

It is therefore ordered and adjudged that the judgment of the District Court be affirmed with costs of appeal.

NO. 1780.—JUAN GARCIA Y MORA v. JOHN C. KUZAC et als.

Under the act of March 29, 1865, the Fourth District Court of New Orleans was without jurisdiction to issue an injunction against the execution of a judgment of a justice of the peace, the Third District Court of New Orleans having exclusive jurisdiction over such cases by this act.

The institution of a suit in a court that has no jurisdiction is null, and the subsequent investiture of jurisdiction will not cure the nullity.

A PPEAL from the Fourth District Court of New Orleans. *Théard, J. Collens & Wooldridge*, for plaintiff and appellant. *C. E. Schmidt and John H. Rees*, for defendants and appellees.

TALIAFERRO, J. For an alleged illegal and vexatious seizure and advertisement of sale of the plaintiff's stock of merchandise by the defendant, acting as constable of the Second Justice of the Peace of New Orleans, and under color of a *fieri facias* issued on a judgment rendered by said second justice in a suit entitled *H. Blaize & Co. v. Canales*, the plaintiff sued out a writ of injunction staying the proceedings complained of, and praying against the seizing creditors, *Blaize & Co.*, judgment for one thousand dollars as damages. This injunction suit of the plaintiff was brought in the Fourth District Court, the petition being filed on the tenth of February, 1868. The defendants excepted to the jurisdiction of the court, and the exception was sustained, the injunction dissolved and the suit dismissed.

From this judgment the plaintiff appeals.

This suit was commenced prior to the adoption of the present Constitution, and by the law in force at that time the Third District Court of New Orleans had exclusive jurisdiction of cases of this kind. For by the act approved March 29, 1865 (Acts of 1864 and 1865, p. 84, sec. 10), it was provided that "in all cases where a party shall have cause to complain of any judgment by a justice of the peace, or act of any constable of a justice of the peace or his deputies, and shall think proper to apply to a higher court for relief, by writs of injunction, mandamus, sequestration, action of nullity, or otherwise, it shall be to this court only that he shall apply for relief."

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But it is contended on the part of the appellant that since the trial of the case in the court below, that court or its successor, the present Fourth District Court, has become vested with jurisdiction of the case, and the Third District Court or its successor deprived of all jurisdiction except that of appeals from justices of the peace, and therefore it would be vain to dismiss this suit.

We do not concur in this view of the case. The institution of a suit in a court without jurisdiction is null, and the investiture of that court with jurisdiction at a subsequent period has no effect to cure that nullity. We think the suit was properly dismissed.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed, the appellant paying costs in both courts.

NO. 2449.—STATE OF LOUISIANA ex rel. WILLIAM A. FRERET v. GEO. M. WICKLIFFE, Auditor, etc.

The appeal will be dismissed when the failure to make proper parties to the appeal is imputable to the appellant.

A PPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. A. & M. Voorhies*, for relator, appellee. *S. Belden*, Attorney General, for defendant and appellant.

Howe, J. A motion has been made to dismiss the appeal taken herein by the State, a third party interested, on the ground that the defendant in the judgment has not been made a party appellee. The appeal was taken by petition of the Attorney General, which prayed that the relator be cited, but contained no prayer for the citation of the defendant. The necessary parties not being before us, and this defect being the fault of the appellant, it is ordered that the appeal herein be dismissed.

NO. 2366.—STATE OF LOUISIANA ex rel. JAMES P. SULLIVAN et als., v. WILLIAM S. MOUNT et als. N. C. KENDALL, appellant.

In a controversy for office under the intrusion act, a third party, not holding or claiming the office in dispute, cannot appeal from the judgment of the court *a qua*.

A PPEAL from the Fifth District Court for the parish of Orleans. *Leaumont, J. Billings & Hughes* and *C. S. Rice*, for appellant. *H. D. Ogden* and *A. & M. Voorhies*, for appellees.

WYLY, J. The Attorney General, on the information of James P.

sale of persons are null and void, and shall not be enforced by the courts of this State." A contract originally for both land and slaves, shorn and divested of its legal force as to the recovery of the unpaid part of the price of the slaves, is not a contract for the sale of persons. Obligations originally entered into to pay a stipulated price for land and slaves, have since become utterly and absolutely null, to the full extent to which the estimated value of the slaves formed a part of the consideration. These obligations, then, are no longer obligations for the payment of the price of slaves. I see no violation of the constitution in rejecting that part of the contract which is null, and enforcing the part that is valid. I think substantial justice between the parties can only be done by ascertaining the value, at the time of the sale, of the land separately, and that of the slaves separately; and, rejecting the latter in the computation, adjust the indebtedness for the land, and where partial payments have been made before the nullity of a portion of the consideration arose, dispose of them as the parties have applied them, to the aggregate sum fixed for the entire purchase. I see no inordinate difficulty or inconvenience in thus disposing of cases of this kind, and I think it the most equitable mode.

Justice Howe, concurring.

In this case there was a sale of lands, movables and slaves for the price of \$18,000, and it is admitted that the estimated value of the lands and movables was one-half this sum. Six thousand dollars were paid in cash, and for the balance four notes were given of \$3000 each. Three of these notes were paid. As obligations, they have been extinguished. There is no longer any legal question as to them. The remaining note of \$3000 is now before us. It has never been paid or otherwise extinguished, and we are now called upon to enforce it. To the extent of one-half, its consideration is valid, and to that extent the holder is entitled to judgment. As to the other half, the jurisprudence of the State, as settled by repeated decisions, has declared that it can not be enforced. For these reasons I concur in the decree just pronounced, believing that it in no way enforces a contract for the sale of persons.

Chief Justice Ludeling dissenting:

I cannot concur in the views expressed by the court in this case.

The prohibition in the constitution is: "All contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State."

In *Groves v. Clark & Carnal* (21 An. 567), this court, commenting on the article, said: "Article 128 of the constitution is couched in clear

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and unambiguous language. Its terms are unequivocal, its expression imperative." * * * * *

"In the face of this paramount authority, so plainly enunciated, can the courts of this State enforce contracts which it reprobates, whether the holder of the obligation is in good or bad faith, or the holder before or after maturity? The positive prohibition of article 128 makes no exception in favor of one class of holders over another. Shall the courts make such an exception?"

"None dispute that obligations of the sort in question are, by the terms of the article 128 of the constitution, *utterly and absolutely* null and void in the hands of the original parties. If thus stricken with nullity, what is to revive and give them validity? We hold the purpose of article 128 of the constitution of the State to be clear and without doubt, and that *that purpose* is, that *the contracts, which it reprobates, shall be null*, in whose hands soever they are found, and that the courts are forbidden to enforce them, whether held by owners *bona fide* or *mala fide*, and without reference to the time they acquired them."

If we apply the reasoning of the court to this case, to what conclusion are we driven! "The positive prohibition of article 128 makes no exception in favor of one class of holders over another." Does it make any exception in favor of a contract which is only in part for the sale of persons? "*All contracts for the sale of persons shall be null and void, and shall not be enforced by the courts of this State.*" Does the obligation sued on arise from a contract for the sale of persons? This is not denied. There was but *one contract*, and slaves as well as lands and personal property were embraced in it. In the same case we said: "By the decision in the case of *Wainwright v. Bridges*, followed by many decisions affirming it, it was fully settled *that contracts for the payment of the price of slaves were null, and that the courts could not enforce them.* These decisions were *the settled law* of the State *before the adoption of the constitution of 1868.* There was no call for the insertion of the article 128 of the constitution if the framers of the organic law *did not intend to render null and abortive*, in the hands of any holder whatever, *all obligations of the kind treated of.*" What are the kinds of contracts treated of?" "*All contracts for the sale of persons.*" The constitution does not say that only so much of the contract as relates to the price of the slaves shall be null, for that much was already decided to be null by the courts, but it declares that all such contracts shall be entirely null.

Under a strict construction of article 128 of the constitution no part of the contract can be enforced by the courts of the State.

If we adhere to the doctrine enunciated in the case of *Wainwright v. Bridges*, so long followed by us, the result would be the same, even if we were permitted to disregard the prohibition in the constitution—because a contract which is tainted, in part, with an *immoral* consideration, is void *in toto*, under the English and American, as well as under the civil law and the laws of this State. *Cole v. Cole*, 7 N. S.

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423; 19 An. 33, 339; 2 Pothier (Evans) pp. 17 and 18; Story Promissory notes, page 190; Smith Mer. Law, 344; Parson's Contracts, vol. 1, page 445, vol. 2, page 673; 11 Wheaton, 258; 2 Peters, 527; 14 How. 38; 16 How. 314; 17 How. 232; Chitty on Contracts, pp. 692, 693.

Reference has been made to a case in 6 Mass. Rep. p. 330, in support of a contrary view. I humbly conceive that the authority supports my position, if it can be said to decide anything on the question. Parsons, C. J., said: "This action is assumpsit on a promissory note for the delivery of slaves, and the payment of *bars*, which are an African currency, and also on an *insimul computassent*." * * *

"The second objection that no action, upon either of the promises alleged, can be maintained in this State, is principally relied on by the defendant." * * "The slave trade, he has argued, is, or has been prohibited by a statute of the Commonwealth, in the preamble to which it has been declared to be an unrighteous commerce, and he attempted to show that in itself it was immoral. This objection deserves much consideration."

The court then states, that, by the common law, upon principles of national comity, a contract made in a foreign place, or to be executed there, if valid by the laws of that place, may be a legitimate ground of action in the courts of Massachusetts, although such contract may not be valid by our laws. There are two exceptions to this rule: when the commonwealth or its citizens may be injured by giving effect to the contract, or when the giving effect to the contract would exhibit to the citizens of the State an example pernicious or detestable; and, the court says, such contracts cannot be enforced because the consideration is immoral, and a judgment in support of it would be pernicious from its example. "And, perhaps, all cases may be considered as within this second exception, which are founded on *moral turpitude*, in respect either of consideration or the stipulation." "Laying the count on the note out of the case, we shall consider the question of *moral turpitude*, so far as it respects the count on the *insimul computassent*; and we are satisfied that the objection does not apply to the contract averred on in this count."

What was the contract averred on in that count? The defendant had agreed to deliver to the plaintiff a certain number of *slaves and bars* for a cargo of *merchandise*. The merchandise was delivered, and the defendant delivered a part of the slaves, "and having become the creditor of the plaintiff for supplies furnished to his use, states his account, in which, after deducting the slaves delivered and the supplies furnished, he acknowledges a balance in cash, and the plaintiff having assented to the account, demands the balance in this action." The suit was on a new contract in which money was acknowledged to be due for *merchandise* received, not slaves. The court said very properly,

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“we see no legal objection to his recovery. The consideration of the *implied promise*, arising from *this settlement is the sale of the cargo*, which involves *no moral turpitude*—neither is the performance of the promise, *by paying the balance in cash, immoral*. And, although, on the same day, the defendant, *in consideration of this balance due in cash*, promises by his note to discharge it principally *in slaves*, and a small remainder in cash, *yet this promise is no bar to an action*, by the plaintiff *on the account*, even if the promise by the note is here considered as legal, and *a fortiori* if it be considered as void for its immorality.”
6 Mass. R. 380.

If, departing from the plain terms of article 128 of the constitution, we construe it to mean that contracts for the sale of persons shall not be enforced, except to the extent of the *good consideration*, and we determine further, that the *good* can be separated from the *bad consideration* of the contract, still the result will be the same in this case, for we could enforce the payment of the *price of the land and personal property only*, and the payments already made largely exceed their price.

The vendor sold lands and slaves together for \$18,000. It is admitted that the price of the slaves was \$9000. Fifteen thousand dollars have been paid, and we are asked to enforce the balance. Would we not enforce the payment of the price of slaves, if by our judgment the vendor were enabled to collect any more money on his contract? Nine thousand dollars was the price of the lands. Every dollar which he *has received*, or which he *may receive*, through the aid of this court, over nine thousand dollars, will be on account of the price of the slaves. And, yet the judgment of this court will enforce *one-half* of the balance claimed, thus enabling him to collect \$16,500.

The conclusion of my learned brothers seems to be predicated upon the supposition that there were *several debts*, evidenced by four notes; that the consideration of each note was slaves and land, and that by the payment of three of these notes (which were mere installments of one debt), the parties themselves *imputed* or applied the sums of money paid, equally to the slave and land consideration of *each note*.

This, in my judgment, is an error. There was but *one contract*, from which arose *one debt*, to wit: the obligation to pay the price of the property bought, and which was secured by one mortgage.

The fact that *the debt* was payable *in installments* did not destroy the unity of the debt. C. P. article 686.

Suppose A sell to B a tract of land for \$10,000, payable in four equal installments, evidenced by four notes. B pays two of the notes, and then he is evicted of one-half of the lands bought, worth \$5000. A sues B on the unpaid notes, and B pleads *the failure of consideration* to the extent of the value of the land taken from him. Would any court hold that *one-half* of the unpaid notes could be collected because the consideration of those notes had only failed to the extent of *one-half*?

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In case there is only a *partial want* of consideration, the obligation is affected with nullity *pro tanto*. "The same rule applies to cases where there was *originally no want of consideration*, but there has been a *subsequent failure* thereof, either in whole or in part." Story's Prom. Notes, No. 187.

"There is no difference between a *want* and a *failure* of consideration." 12 M. 403.

If there was failure of consideration, there was *no debt*, and when there is no debt there can be no question of imputation of payment, or payment. 4 Marcadé No. 667; C. C. 2129.

There being but *one debt*, and that only to the extent of the price of the land, \$9000, every dollar paid went to the extinguishment of that debt.

"It shall always be intended, that if money is paid, it shall be applied to the discharge of that which the debtor was *legally* owing, and not upon that which (so to speak) he was owing illegally." 9 Iowa 384; Smith, Twogood & Co. v. Coopers & Clark. "When the contract under which the wrong was perpetrated, and which has been in part performed, is brought before the courts by the immediate parties to it for further enforcement, *reason and good morals, as well as law*, dictate that, *as far as possible*, the wrong should be made right." *Ibid.*

But if the courts of this State are powerless to recognize the existence of a debt for slaves at all, since the adoption of the constitution of 1868, and the fourteenth amendment to the constitution of the United States, and the question of imputation could have arisen under the contract, how would the payments have been imputed?

The imputations must be made *expressly and at the time of the payment*, by one or the other of the parties, or the law will make it. C. C. 2160, 2162.

The record does not show that either of the parties *expressly made* any imputation—hence the law made it. How? By applying the money to *the debt* which the *debtor* had most interest in paying. After the decision of the case of Wainwright v. Bridges, and the numerous cases since decided, affirming the principles therein enunciated, the least that can be said of the titles to slaves is that they were *precarious*; and if precarious, the debtor had most interest in discharging the price of the lands.

In Hynes v. Cobb, 2 An. 364, this court said the amount promised to be paid in the note was composed of the sum loaned with twenty per cent. added thereto, on which interest was stipulated at the rate of ten per cent. after maturity. "An indorsement was made on the note of a payment of \$240. *No imputation is expressed in the receipt*, nor otherwise shown. In an ordinary case *the law* would make the imputation to the interest. But the article of the code, which directs *that impu-*

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tation must be construed in connection with other rules *in pari materia*. One of these is, where the receipt bears no imputation the payment must be imputed to the debt, which the debtor had at the time most interest in discharging, of those that are *equally due*." 2 An. 362; 5 An. 620.

But I consider that we have decided the precise principle involved in this case.

In *Brou v. Becnel*, 20 An. 254, the suit was for *the balance of notes* given for *lands and slaves*. The answer alleged that *the consideration thereof had failed* by reason of the emancipation of the slaves included in the sale, and that the full value of the land had been long since paid. The issue presented by the pleadings in that case was precisely the one now presented for decision. And this court said: "We conclude that Becknel can oppose the plea of failure of consideration as to both the *personal and real obligation*; but the evidence does not show the *relative value of the slaves and the other property sold*; and we think that justice requires the remanding of the cause to ascertain this fact, and the amount, if any, for which she is liable for property other than slave property."

In *Haden v. Phillips & Foster*, 21 An. 517, we held that payments made on an obligation given for land and slaves must be credited on the price of the land. Why? Because "the law will not presume that the payments made by him were for their price, but must be held to have been made on that which was, and is property. And, besides, to make him pay the balance claimed, would virtually be enforcing a contract for the sale of persons, by making him pay more than the full value of the land and movables bought by him? See, also, *Dranguet v. Rost*, 21 An. 538, and *Armstrong v. Lecompte* 527.

Again—Hortense Patin died in 1861, and on the *twenty-eighth of December of that year*, a sale of the effects of her succession was made. At the sale certain slaves were purchased by the heirs. In 1867 an account was filed. The heirs opposed the account, alleging that they were illegally charged with the amount of their purchases of slaves. There was judgment rejecting the opposition so far as the inheritance of each was concerned, that amount being deemed to be settled by confusion to the extent of their purchases.

On appeal this court said,

"We are constrained to think that the judgment was erroneous; under the jurisprudence of the State, as well settled, the obligations contracted by the heirs, by their purchase of December, 1861, being null and void, cannot be an element in either confusion or compensation. To recognize them as such would be practically to enforce them." 19 An. 234; Constitution, Art. 128; C. C. 2205, 2214. See 21 An. 661.

I feel authorized therefore to assume that the question presented here has been decided; and I think the rule *stare decisis* should con-

R. S. Sandidge v. J. S. Sanderson, and J. S. Sanderson v. R. S. Sandidge. (Consulted.)

trol us in cases like this, even if we doubted the correctness of the previous rulings; but I am not convinced that there is error in these decisions; on the contrary my judgment approves the opinions rendered in *Brou v. Becnel*, *Groves v. Clark & Carnal*, *Dranguet v. Rost*, *Armstrong v. Lecompte*, *Haden v. Phillips & Foster*, and the succession of *Hortense Patin*. The plaintiff's demand should be rejected.

Justice Howell, dissenting.

I concur in the opinion of the Chief Justice, that the question involved in the controversy has been settled in several cases, decided during the recent summer terms of this court, in which the legitimate and logical application of the principles and doctrines of the *Wainwright* and subsequent similar decisions was made. See *Haden v. Phillips et al.*, 21 A. 517; *Armstrong vs. Lecomte*, *ib.* 527; *Dranguet vs. Rost*, *ib.* 538; *Groves vs. Clark et al.*, *ib.* 567; *Suc. Hortense Patin*, *ib.* 661. The only theory on which the conclusion of the majority of the court, in this case, can in any way be reconciled with the existing jurisprudence on the subject, is that the contract has been voluntarily executed *pro tanto* by the parties as to the slave consideration. But a contract cannot properly be considered as executed, in the sense of that term in this connection, as long as there is any portion of it to be enforced, and during such time, the debtor may set up any defense he may have to its enforcement, and claim the benefit of any payment made by him. Without direct, positive proof that the payments were made on the price of the slaves, we should not, under our jurisprudence and the constitution, presume that they were so made. I can but think that the decision in this case is in conflict with our jurisprudence on the subject.

ON APPLICATION FOR REHEARING.

In this case, the injunction having been maintained to the extent of the slave consideration, the costs of the lower court should be borne by the defendant.

It is therefore ordered that the judgment of this court, rendered on twenty-ninth November, 1869, be amended so as to make the defendant in injunction pay the costs of both courts; and the rehearing prayed for is refused.

Satterfield v. Spurlock; Spurlock v. Satterfield; and Satterfield v. Spurlock. (Cumulated.)

**NO. 2495.—SATTERFIELD v. SPURLOCK; SPURLOCK v. SATTERFIELD;
and SATTERFIELD v. SPURLOCK; cumulated.**

Where a sale of land and slaves was made before emancipation, and notes were executed for the price, and the purchaser afterwards reconveys or retrocedes to the vendor a portion of the slaves at a fixed price, and a credit is given to the purchaser on a particular obligation of his, given to the vendor as a part of the price of the sale, the vendor is bound by the act, although emancipation had taken place before it was passed. The vendor, having agreed to and accepted the retrocession, cannot afterwards invoke its immorality and nullity to avoid its effect.

In a suit to enforce a contract founded on a mixed consideration, part land and part slaves, if the evidence fails to show what portion is for land and what for slaves, the case will be remanded for the purpose of ascertaining by evidence the relative proportions of each.

A PPEAL from the parish of Avoyelles—*Edwards, J. J. H. Overton* for plaintiff and appellee. *A. B. Irion & E. North Cullom* for defendant and appellant.

WYLY, J. On eighth October, 1857, Satterfield sold to Spurlock certain lands and movables, together with sixty slaves, in the parish of Avoyelles, for the price of one hundred and sixty-five thousand six hundred dollars, payable in ten equal annual installments, evidenced by notes for sixteen thousand five hundred and sixty dollars, each maturing respectively on eighteenth May, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867 and 1868; and securing the payment thereof by special mortgage on the land and slaves.

On ninth October, 1857, as additional security to the first three notes (maturing in 1859, 1860 and 1861), Spurlock executed a special mortgage, in favor of Satterfield or any holder or holders of said notes, on his plantation and forty slaves which he owned previous to said purchase; and his wife joined in said act, renouncing her tacit mortgage.

The first two notes were paid by Spurlock; but on failing to pay the third, Satterfield sued out an order of seizure and sale against all the property mortgaged, which was enjoined by Spurlock on twenty-sixth of September, 1861.

On twelfth April, 1865, Spurlock, by notarial act, reconveyed to Satterfield thirty-seven of the slaves which he had purchased from him, estimating them at thirty-six thousand three hundred and fifty dollars. He also conveyed to him movables estimated at one thousand and thirty-five dollars, making in the aggregate thirty-seven thousand three hundred and eighty-five dollars given in payment of his indebtedness to Satterfield.

This sum was expressly imputed to the payment of the third note upon which the order of seizure and sale was granted, and the balance was imputed to the other note or notes then due.

And the said Satterfield further stipulated in said notarial act, that he specially "requires and authorizes the recorder of the parish of Avoyelles to erase and cancel the amount of thirty-seven thousand three hundred and sixty-five dollars on the mortgage retained by the

Satterfield v. Spurlock; Spurlock v. Satterfield; and Satterfield v. Spurlock. (Consolidated.)

sale of the eighth of October, 1857, in the act of sale of E. H. Satterfield to Thomas J. Spurlock of land and slaves; applying the said sum, first, to the payment of the *third* note, principal and interest, that is as yet due and unpaid; and then if more than sufficient to the payment of the same, to apply the remainder to the payment of the fourth, fifth, etc., notes as it will suffice." * * *

On seventh August, 1865, Satterfield obtained from the clerk of the District Court of the parish of Avoyelles a writ of provisional seizure, requiring the sheriff to seize and take into his custody "all the cotton, either baled or in the seed, found on the plantation heretofore belonging to said E. H. Satterfield and sold to said Thomas J. Spurlock; and also all the cotton found on the plantation belonging, on ninth October, 1857, to said Spurlock, and by him mortgaged to said Satterfield; and also about thirty-two bales lying at Simmsport, in this parish, as part of the crop of cotton raised on said plantations since and during the year 1861; also, all the stock attached to said plantations, and farming utensils thereupon found." * * *

Under this writ, was provisionally seized by the sheriff a lot of cotton and movables on each of the plantations, viz: the one acquired from Satterfield and the one previously owned by Spurlock.

The pleadings are quite irregular, and do not fully present the prominent questions of controversy; but as proof disclosing them has been received without objection, we will consider the questions as though regularly stated.

The important question for consideration is: Did the act of retrocession of the twelfth April, 1865, discharge the debt from Spurlock to Satterfield to the amount of thirty-seven thousand three hundred and eighty-five dollars, as stipulated in said notarial act? If it was a discharge of debt, undoubtedly the note, upon which the order of seizure and sale was obtained, has been paid, because the amount of *the giving in payment* was first specially imputed to it.

If this note was thus discharged, then the plantation and slaves mortgaged on ninth October, 1857, as additional security, ceased to be encumbered. It was only mortgaged to secure this note and the two preceding ones, which were not in suit, having been previously paid Spurlock. As a consequence, the order of seizure and sale could not be enforced against the plantation and slaves owned by Spurlock previous to his purchase from Satterfield.

It appears that Satterfield, in April, 1865, urged his debtor, Spurlock, to reconvey to him part of the slaves, desiring to remove to Texas and still to cling to the desperate fortunes of the Confederacy. In answer, Spurlock replied that he would surrender them and certain movables valued at the prices of 1861; "For which I want you to deliver me my third note and place the balance on the fourth as a credit, and authorize the recorder to erase the mortgage on my private prop-

Satterfield v. Spurlock; Spurlock v. Satterfield; and Satterfield v. Spurlock. (Cumulated.)

erty. In event, if the negroes run off on account of your making an effort to remove them, it must be at your loss or risk. At present, they are all satisfied and doing well, and I am fearful that an effort to move them will cause trouble and loss. But at the same time, I know by right the property is yours, and therefore I will do all in my power to get them off with you." * * *

Spurlock also stated, in surrendering the slaves at that time, it would subject him to loss in his crops, having already planted, and he wished this taken into consideration. The terms of the reconveyance or retrocession were accepted by Satterfield, who informed Spurlock that: "If the negroes make their escape after I get possession of them, it will be my loss. All I ask, that they be put in line, named and delivered; as you have them in possession, you can easily do it." * * *

The agreement was carried into effect by notarial act, and the thirty-nine slaves and certain movables were given in payment of the existing indebtedness of Spurlock to Satterfield to the amount of thirty-seven thousand three hundred and eighty-five dollars, with the imputation and order for erasure of the mortgage, as heretofore stated.

Satterfield thus recovered the possession of part of the slaves which he had sold; he moved them to Texas in vain; they were emancipated, and he lost possession of them.

He now contends that the act of retrocession of twelfth April, 1865, was unlawful, and he should not be bound by the *pro tanto* discharge therein granted on the obligation of Spurlock to him. That at that time the slaves he sought so anxiously to have reconveyed to him, were already emancipated, and the giving in payment was *contra bonos mores*.

This position cannot be maintained. He cannot expect this court to relieve him from the consequences of his own immoral transaction. If, for an immoral cause, he has granted an acquittance to the amount of thirty-seven thousand three hundred and eighty-five dollars on the indebtedness of Spurlock to him, imputing it to certain notes, and requiring and authorizing the recorder to make the erasure of the mortgage as heretofore stated, he certainly cannot expect this Court to relieve him. The policy of the law is to leave the parties where their immorality has placed them. The contract was executed, the giving in payment was carried into effect at the urgent solicitations of Satterfield, and he will not be relieved by this Court from the consequences of his own turpitude.

The objection that the title derived by the retrocession was defective on account of the claims of the heirs of Mrs. Spurlock is of no force. Satterfield had a mortgage and vendor's privilege superior to the claims of any one; he was fully aware of the situation of the title; indeed, he was simply retaking, by consent, what he could have recovered by law had the slaves remained lawful objects of contract;

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but even if the heirs of Mrs. Spurlock had valid claims to the objects retroceded, all he could do in bar of the enforcement of the terms of that contract on him, if threatened with eviction, would be to require security against the disturbance of his titles from that quarter. But we will not entertain the complaints of parties arising out of transactions reprobated by law. The retrocession of slaves was, at the time, unlawful; it was executed, and this Court will grant no relief to either party.

As to the provisional seizure, we think it issued improvidently. The products of the predial estates accruing under seizure, cannot be held by the judgment creditor after the satisfaction of the writ under which the estates were seized.

The giving in payment of the twelfth April, 1865, discharged the note on which the order of seizure and sale was granted. It does not appear that plaintiff is the holder of the fourth note of the series, although he is of the others.

We have arrived at the conclusion that the *giving in payment* was an executed contract, extinguishing the indebtedness from Spurlock to Satterfield to the amount of thirty-seven thousand three hundred and eighty-five dollars, which sum was, by the parties, imputed to the third note, and the balance to the other notes next in order owned by the plaintiff.

The discharge of the third note, being the last incumbrance on the property owned by Spurlock prior to his purchase from Satterfield, relieved that property from the mortgage.

As to the remaining notes, after the credit arising from the giving in payment of twelfth April, 1865, we think they should be paid in proportion to the amount of the consideration thereof that was not for slaves. We cannot discover, from the record, the proportion of the consideration for slaves, and, therefore, deem it proper to remand the case to ascertain the relative amount of the slave consideration in said notes which cannot be enforced. The principle involved in *Sandidge v. Sanderson*, lately decided (21 An. 757), we deem applicable to this case.

It is therefore ordered, that the judgment of the Court below be avoided and annulled; and it is ordered that the discharge of the indebtedness of Spurlock to Satterfield to the amount of thirty-seven thousand three hundred and eighty-five dollars, resulting from the retrocession of the twelfth of April, 1865, remain undisturbed, with the imputation as stipulated by the parties; that the third note, the one that was mature when the order of seizure and sale was granted, be considered discharged; that the mortgage granted by Spurlock on ninth October, 1857, on property owned by him prior to his purchase from Satterfield, be also considered discharged; that the writ of provisional seizure be set aside at the costs of plaintiff therein; and that

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the cause be remanded to ascertain the relative amount of the slave and other considerations in the remaining notes of Spurlock filed in this cause by Satterfield, with instruction that no judgment can be rendered by the Court of the first instance for the slave part of the consideration of said remaining notes. It is further ordered that plaintiff pay costs of this appeal.

Rehearing refused.

Chief Justice Ludeling and Justice Howell absent.

LIST OF CASES NOT REPORTED.

NEW ORLEANS.

- No. 6531—Walter Bennet *v.* Redding & Co.
No. 6970—George Schlosser *v.* Estate of A. Ebinger.
No. 1569—Slark, Stauffer & Co. *v.* Kitridge & Ewing.
No. 1953—P. S. Dusouchet *v.* McEntire & Stribling. W. M. Perkins,
Intervenor.
No. 1411—Chattanooga Savings Institution *v.* Citizens' Bank of Louisi-
ana.
No. 1476—Cumberland Dugan *v.* John G. Fleming.
No. 1703—Kells & Hopper *v.* John Gauche.
No. 1523—Patrick Halpin *v.* A. G. Price.
No. 1946—State ex rel. J. J. Ducote *v.* The Judge of the Seventh Ju-
dicial District.
No. 1475—Baptiste Piffet *v.* Arthur Stone & Co.
No. 2124—R. W. Roberts *v.* Mrs. C. B. Hope and Husband.
No. 1818—Mary Wolf *v.* Peter Kerber.
No. 6866—Green, Harding & Co. *v.* Norment Cooper & Co.
No. 6808—A. Cassard & Co. *v.* Mrs. Ann B. Cox.
No. 580—James M. Peterson *v.* Barbot & Warren.
No. 616—J. L. Warner *v.* Alfred Shaw, Sheriff, and J. M. Peterson.
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No. 1828—Forcheimer Brothers *v.* Schooner Fancy et al.
No. 1401—Mrs. D. St. Romes *v.* Mr. and Mrs. P. E. Wiltz.
No. 1536—Succession of Sarah Jane Stone.
No. 2209—State *v.* Navarra.
No. 1573—F. G. Barrier & Co. *v.* Mrs. A. Flash.
No. 1582—S. R. Bell *v.* James Mayers.
No. 1595—J. Maristang & Co. *v.* Barnett & Shepherd.
No. 1775—W. H. Diukgrave *v.* Brander, Williams & Co. et al.
No. 2163—Succession of James McCabe.
No. 2220—State ex rel. Thomas S. Serell *v.* William S. Mount, Treas-
urer, et al.
No. 1997—Succession of Joseph Arrican.
No. 1526—Samuel Stewart *v.* Aymar & Church,
No. 2176—City of New Orleans *v.* O. E. Hall.
No. 1537—Semmes & Mott *v.* Calvit Roberts et al.

- No. 1994—State *v.* Brinkerman.
 No. 1973—State *v.* Dufilho.
 No. 1903—Succession of James Alexander.
 No. 1762—Vanwickle *v.* Gauche.
 No. 2305—Springlett *v.* Moodey.
 No. 2071—Davison Ex. *v.* Mahan, tax collector.
 No. 1456—Succession of Octave S. Rousseau.
 No. 1470—John L. Sterry *v.* Fellowes & Co.
 No. 1777—C. A. Weed & Co. use Peter Woodliff *v.* Dr. Campbell.
 No. 1786—T. D. Carey *v.* Thomas P. May & Co.
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 No. 1743—Henry Knox & Co. *v.* Joseph Jouet.
 No. 1776—John L. Morency *v.* James Martin.
 No. 1773—Gretna M. E. Church South *v.* Schmucker, sheriff.

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- No. 75—Lewis Thompson *v.* Lizzie Simmons, Administratrix.
 No. 51—Tarleton, Whiting and Tullis *v.* C. R. Hearne.
 No. 58—State of Louisiana *v.* W. A. Shropshire et al.
 No. 57—State of Louisiana *v.* Felix Lagroue.
 No. 59—State of Louisiana *v.* George McD. Madere.
 No. 78—Lawrence Hart *v.* Block & Tiche.
 No. 38—R. Reitzel *v.* Estate of Martin, and Martin, Administrator, &
 Reitzel—Consolidated.
 No. 46—Hodge Raburn *v.* Lycurgus Cage, Administrator.
 No. 33—C. T. Dunn *v.* S. W. Reiley.
 No. 72—McStea, Value & Co. *v.* V. V. Thompson & Co.
 No. 44—James R. Smith *v.* A. Willis.
 No. 20—Dow & Walsh *v.* McDonald & Hardy.
 No. 53—M. M. Calderwood, Executor *v.* William Calderwood.
 No. 76—Mary Sylverstein, Tutrix, *v.* John G. Noles, et al.
 No. 132—Thomas H. Patterson *v.* R. B. Stille & Co.
 No. 126—Citizens' Bank *v.* Bouvard St. Amans.
 No. 135—John T. Yates *v.* C. A. Nelson et al.
 No. 121—Bank of Louisiana *v.* Louis Marcy.
 No. 125—Thomas B. Roberts *v.* W. C. Roberts.
 No. —C. F. Dranguet, Administrator *v.* Henrietta M. Bossier.
 No. 104—S. Hollingsworth *v.* M. E. Holloway et al.
 No. 103—Carrie Hodge, Tutrix, *v.* Martha E. Holloway, Administratrix.
 No. 30—Rhodes, Tutrix, *v.* Elzy, Tutrix.
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 No. 75—James McRady, Executor, *v.* Jonathan Sprowl.
 No. —C. F. Dranguet *v.* A. Greneaux, Administrator.
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- No. 36—Alexander L. Deblieux, Administrator, *v.* Louis Dupliex et al.
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- No. 1—Sarah P. Cumming *v.* Mary V. Price.
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 No. 155—Alexander Norton et al. *v.* Ralph S. Smith.
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 No. 98—Ebenezer Deblee *v.* Samuel W. Henarle.
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 No. 142—J. Wells, Curator, *v.* J. M. Wells, Administrator.
 No. 144—Bellock, Noblom & Co. *v.* Montfort Wells.
 No. 151—Josiah Chambers *v.* Mary W. Burgess, Tutrix.
 No. 169—Robert L. Gilman *v.* H. B. Orton & Co. et al. City of Shreveport, Warrantor.
 No. 175—State *v.* Nicholas Wykal and Menier Wood.
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 No. 66—James Robeson *v.* Joseph Howell.
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 No. 624—Valery Chaterlain, Administrator, *v.* H. Edwards et al.
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 No. 679—A. P. Noblom *v.* Sydalise Loileau.
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 No. 732—Esther *v.* Francois Richardson.
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 No. 626—M. V. Plauché, Executor, *v.* Auguste Voinché.
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ACCOUNT.

1. An account stated and acknowledged by the other party becomes a closed account, but it may be re-examined afterward by either party for the purpose of correcting errors or supplying omissions.

Poindexter and Pollard v. King, 697.

ACTION.

1. The vendee cannot maintain an action against the vendor to rescind the sale of imported goods on the ground that the duties had not been paid to the United States, when it is shown that the port was under the control of insurgents at the time.

Snodgrass v. Adams, 136.

2. An action will not lie to enforce a contract, the consideration of which is shown to be the price of the sale of slaves, nor will an action lie to compel the vendor to return the portion of the price paid before emancipation. *Wainwright v. Bridges*, 19 An. 234.

Gosselin v. Womack and Thompson, 193.

3. Where a party, during the late war, placed a large amount of Confederate treasury notes in the hands of another as agent, to invest in the purchase of cotton, and the agent failed to give a correct and faithful account of the transaction to his principal, no action will lie to enforce a settlement of the dispute between the principal and agent.

Juliard v. Rogay, 259.

4. An action of slander will not lie for anything said by a witness in answer to questions propounded by either party in a judicial investigation.

Ter. y v. Fellows, 375.

5. The character which plaintiff gives to his action by his pleadings must govern in determining the prescription applicable to it.

Burch v. Willis, 492.

6. An action for damages founded on a tort is prescribed by one year.

Ib.

7. The allegations in a petition for injunction against an order of seizure and sale show, that the consideration of the debt for which the mortgage was given was Confederate notes, and that petitioner is the surviving partner of her deceased husband, and, as such, is entitled to one thousand dollars out of his estate by preference. Held—That the petition disclosed an interest in preventing the payment of this illegal debt, and therefore disclosed a cause of action.

Richard v. Beauchamp, 635.

ABSENTEE.

1. If the appellee reside in another State, citation is to be made on the advocate, not the agent or attorney in fact.

Parker v. Davis, 157.

2. A resident of New Orleans who, shortly after the Federal forces took possession of the city, in 1862, registered himself as an enemy of the United States, and left the Federal lines of military occupation for the insurrectionary districts, cannot be viewed in the light of a person banished or forced away from his domicile against his will and without his consent.

Lasere v. Rochereau & Co., 205.

3. Where a party, while residing in New Orleans, executed a mortgage on his property here, and afterward, by his own voluntary act, leaves the State and remains away for nearly two years, having left no agent in charge of his property, or authorised to represent him, nor housekeeper in possession of his former residence, with no known intention of returning to the State at any future time, he must be regarded and treated by the mortgage creditor as an absentee, who, in a suit against the property mortgaged may cause a curator *ad hoc* to be appointed to represent the absentee, with whom proceedings may be conducted contradictorily, and the property seized and sold to satisfy the mortgage rights.

Ib.

4. Real property situated in Louisiana, owned by a French subject residing in France, can not be administered in the courts of France; such property thus situated forms a separate succession from that in France, and must be administered according to the laws of Louisiana.

Succession of de Roffignac, 364.

5. Heirs residing in France must be recognized as such by the courts of Louisiana before they can be put in possession of property situated in this State, which they have inherited from their ancestor in France.

Ib.

6. The appointment of an advocate to represent the absentee in an attachment suit may be made before service of citation.

Gillis & Ferguson v. Cuny, 462.

7. Citation of appeal must be served on the appellee if he reside in the State, and on the advocate if he be a non-resident. Service on the agent is not good.

McIntosh v. McLeod, 465.

8. If the widow and heirs of the deceased husband whose property is specially mortgaged, be non-residents, the mortgage creditor in a suit against the mortgaged property, may provoke the appointment of a curator *ad hoc* to represent them.

Randolph v. Chapman, 486

ADMINISTRATORS.

SEE EXECUTORS AND ADMINISTRATORS.

AGENT AND AGENCY.

1. A mandatary who has communicated his authority to a person with whom he contracts in that capacity, is not answerable to the latter for anything beyond it. *Barry v. Pike*, 221.
2. A mandatary is not responsible to those with whom he contracts only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers. *Ib.*
3. Where the evidence in the record leaves the question of fact in doubt as to whether the agent is personally responsible on a note which he has given, the case will be remanded for the purpose of receiving further testimony on the point. *Ib.*
4. A commercial firm having executed a power of attorney to their agent to draw bills of exchange upon them, and never having given the public notice of the revocation of the agency, cannot avoid the payment of bills drawn by the agent, on the ground of want of authority to draw the bills. *Caldwell & Shannon v. Neil Brothers*, 342.
5. Where one of two parties must suffer, the loss must be borne by him who contributed to bring it about. *Ib.*
6. A settlement made by the agent before the revocation of the power of attorney is binding on the principal.
Harris v. Cuddy, Brown & Co., 388.
7. Where an agent holds a power of attorney by public act, the presumption is that the parties with whom he acts for and in behalf of his principals, have knowledge of his authority to represent them. *Ib.*
8. An agent of a foreign corporation domiciliated and doing business in this State, cannot invoke the inhibiting clauses of the Constitution of the United States against acts of the Legislature which it is alleged discriminate between the citizens of this State and those of the other States of the Union. *State v. Fosdick*, 434.
9. The agent or depositary of cotton destroyed during the late war cannot be held liable, where it is shown that it was destroyed by overpowering force. *Yale & Co. v. Oliver & Drake*, 454.
10. The mandate to execute a promissory note for another, must be both express and special.
Nally & Co. v. Higginbotham, Administrator, 477.
11. The power is not required to be in writing, but express and special, as distinguished from implied and general. *Ib.*
12. An agent's right to compensation may be inferred from the nature of the services and the relations of the parties, without proof of an express agreement; yet to recover in such case the plaintiff must show some specific act performed in the capacity of mandatary before any implied contract for compensation can be established and form the basis of such recovery. *Wood v. McCranie*, 557.

AGENT AND AGENCY—Continued.

13. Where the names of one of the parties to a contract has been signed by a person representing himself to the other as their agent, and the parties whose names have been thus signed specially deny the authority in a suit to enforce it, the burden of showing authority in the agent to sign the names of the principals, or a subsequent ratification by them, falls on the party who seeks to enforce the contract.

McCarty v. Straus and Baer & Straus, 592.

14. A suit to recover a contract of agency is prescribed by ten years.

Poindexter and Pollard v. King.

15. When an agent, acting in the capacity of a commission merchant, has received produce on consignment, with instructions from the shipper to sell the same for gold, he cannot discharge his liability to the principal by accounting for the net proceeds in a depreciated currency of less value than that for which the property was sold, although the currency be a legal tender dollar for dollar. *Ib.*

SEE AUCTION—*Juillard v. Rogay*, 259.

SEE BELLIGERENTS—*Overby v. Overby*, 493.

SEE BILLS AND PROMISSORY NOTES—*Marks v. Wheelis*, 140.

SEE INJUNCTION—*Williams v. Douglass, Sheriff*, 468.

APPEAL.

1. Where an appeal has been taken from a judgment on a tableaux and opposition thereto, all the parties figuring on the tableaux must be made parties, otherwise the appeal will be dismissed for want of proper parties.

Succession of McCausland, 2.

2. To entitle a party to an appeal it must appear that the amount in controversy exceeds five hundred dollars. Constitution of 1868, art. 74. *Myers v. Mitchell*. 20 An. 533.

State ex rel. Sternberg v. Legarde, 18.

3. The only question to be inquired into on appeal from an order of seizure and sale, is whether there was sufficient evidence before the Judge *a quo* to authorize the fiat.

Citizens' Bank v. Dixey, 32.

4. An order of seizure and sale can not be set aside on appeal on account of subsequent irregularities in the execution thereof. *Ib.*

5. The right of appeal is a constitutional right, and does not depend upon the discretion or pleasure of the District Judge. Const. art. 74. The right to determine primarily whether the appellant has complied with the requirements of the law is vested in the District Judge, but his decision is subject to the revision of the Supreme Court. The proper remedy for correcting the illegal rulings of the District Judge in dismissing the appeal or declaring it devolutive only, after a suspensive appeal has been granted or a bond has been filed, is by writ of *prohibition* and not by *mandamus*.

State ex rel. Johnson v. Judge Fifth District Court, 113.

APPEAL—*Continued.*

6. No person not a party to the suit in the court below, can be made a party, appellee, in the appellate court. In such a case the appeal will be dismissed for want of proper parties. *Suc. of Tyson*, 117.
7. Where the certificate of the clerk shows that the record contains all the testimony adduced, documents filed and proceedings had, the appeal will not be dismissed because there is no bill of exceptions, statement of facts or assignments of errors. 20 An, 213; C. P. 601, 602. *State Bank v. Cammack*, 133.
8. An appeal taken by the defendant must be prosecuted within the time fixed in the order. *Landry v. Landry*, 142.
9. An appeal will not lie in favor of the intervening creditor after the time fixed by the order for the defendant to appeal has expired; in such a case the judgment becomes *res judicata*. *Ib*
10. An appeal will lie from a judgment dissolving an injunction taken out against an order of seizure and sale. The amount of the appeal bond to entitle the plaintiff in injunction to a suspensive appeal is one-half over and above the amount of the judgment dissolving the injunction.
State ex rel. Stackhouse v. Judge Fifth District Court, 152.
11. A suspensive appeal from a judgment dissolving an injunction against an order of seizure and sale will suspend the execution of the order until the judgment is affirmed by the Supreme Court. *Ib*.
12. After a suspensive appeal has been granted and the bond is signed and filed the Judge of the Court *a quo* has no jurisdiction in the cause further than to ascertain that the security is good and solvent. *Ib*.
13. The appeal from a judgment of the District Court involving the right of office, returnable before the Supreme Court in New Orleans, will be dismissed on motion, if the requirements of section 13 of the act of 1866, page 154, have not been observed, in not making the appeal returnable in ten days after the judgment of the lower court.
Ingraham v. Doherty, 174.
14. A third party taking an appeal from a judgment homologating a tutor's account, must make all the parties who have an interest in maintaining the judgment parties to the appeal, otherwise the appeal will be dismissed. *Minors Smith v. Smith, Tutor*, 183.
15. In a proceeding by mandamus, to recover possession of the books, papers and records of an office which he claims, the relator must show that he has an interest in their possession above five hundred dollars, to entitle him to an appeal from the judgment dismissing the rule. *State ex rel. Wrotnowski v. Bryan*, 186.
16. An order for a suspensive and devolutive appeal may be granted by the Judge *a quo*, separately, or both, in one order, and the appellant

APPEAL—Continued.

- may in his discretion avail himself of the benefit of either order by giving the required bond within the time prescribed by law.
Funke, Adm. v. McVay, Tutor, 192.
- 17. An appeal from a judgment annulling a seizure made under a writ of *fi. fa.* will be dismissed where the record does not show that the value of the rights seized is above five hundred dollars.
Docteur v. Tambourg, 193.
- 18. Where the certificate of the clerk to the record of appeal is in due form and the amount of the appeal bond is sufficient to cover costs, the appeal will not be dismissed on motion of the appellee.
Nelson & Co. v. Scott, 203.
- 19. All parties to the record interested in maintaining the judgment appealed from, must be made parties to the appeal, otherwise the appeal will be dismissed.
Dewey v. Bird, Sheriff, 209.
- 20. When more than three judicial days have elapsed after the time fixed by the District Judge for filing the transcript, and no cause is shown for the delay, the appeal will be dismissed on motion of the appellee.
Cousin & Brother v. Johnson, 216.
- 21. The appeal will be dismissed if the transcript is not filed in the Supreme Court within three judicial days after the time allowed the appellant to bring up the record.
New Orleans vs. Merchants' Mutual Insurance Company, 213.
- 22. An application by defendant to remove a cause is analogous to a plea to the jurisdiction, and when ordered by the court, the party against whom it is taken may appeal, but when the order of removal is refused, no irreparable injury follows, and it is unappealable. It will, however, be examined on the appeal taken by defendant from a final judgment on the merits, and if found erroneous will be corrected.
Rosenfield v. Adams Express Company, 233.
- 23. Where citation of appeal is not prayed for by the appellant, and none is issued to the appellee, the appeal will be dismissed.
Adams v. Dermody, 238.
- 24. No appeal lies from a judgment not signed by the judge.
Trost v. Fox and Weber, 261.
- 25. To dispense with citation of appeal, the motion must be made in open court at the same term of the court at which the judgment is rendered.
De St. Romes v. Macarty, 277.
- 26. Where a mandate has issued from the Supreme Court at the instance of one of the parties, to the clerk of the District Court, to amend his certificate, so as to conform to the fact, and show that all the evidence adduced on the trial is not contained in the record, and the clerk answers that he is not aware that other evidence than that embraced in the note of evidence and included in his certificate was offered, the appeal will not be dismissed. The appeal

APPEAL—*Continued.*

- will not be dismissed for want of citation where the appellee appears and urges other grounds for dismissal before that of want of citation. *Lee v. Goodrich, Tutor, 278.*
27. In a suit where the right of office is involved, the appeal will not be dismissed where the failure to file the record within the time prescribed by law is not imputable to the appellant. Sec. 12, acts of 1864, p. 22. *Fisk v. Collens, 289.*
28. Where more than one year has elapsed from the date of the judgment of the court *a qua* before the judgment of the Supreme Court is rendered dismissing the appeal, the appellant will not be entitled to a second appeal, the time having expired within which he could appeal. C. P. 593. *Knox v. Duplantier, 294.*
29. A devolutive appeal from a final judgment does not suspend or interrupt prescription pending the appeal. Acts of 1853, p. 250. *Arrowsmith v. Durell, 295.*
30. Where the value of a schooner, the ownership of which is in dispute, is shown to be above five hundred dollars by the amount of the bond for injunction, and the amount of the appeal bond, the appeal will not be dismissed for want of jurisdiction. Constitution, art. 74. *Gogreve v. Windhorst, 296.*
31. Where the certificate of the clerk of the District Court shows that the transcript is incomplete and not such as will enable the appellate court to examine the case on its merits, the appeal will be dismissed on motion. *Ruleff v. Nugent, 299.*
32. The Supreme Court will *ex officio* notice the want of proper parties, and dismiss the appeal without motion, *Martin v. Taylor & Pinckard, 303.*
33. No appeal will lie from a judgment dissolving an injunction where the amount in dispute is not above five hundred dollars. The fact that the property seized exceeds five hundred dollars in value will not give the Supreme Court jurisdiction of the appeal from such judgment. *Gayarre v. Hays, Sheriff, 307.*
34. Where the appeal is taken in open court, citation of appeal to the appellee is unnecessary. *Fisk v. Moss, 329.*
35. A motion to dismiss the appeal for want of a proper bond will not be noticed by the Supreme Court if not made within three judicial days from the filing of the record. *Ib.*
36. Where the transcript of appeal is duly certified by the clerk of the District Court as containing all the evidence, etc., adduced on the trial, it is sufficient to enable the Supreme Court to decide the case on its merits, and the appeal will not be dismissed. *State ex rel. Hero v. Pitot, 336.*
37. The affidavit of the appellant that his interest in the controversy exceeds five hundred dollars is sufficient to give the Supreme Court jurisdiction of the appeal, *Ib.*

APPEAL—Continued.

38. Where the order of appeal has been granted on petition the appellee must be cited, otherwise the appeal will be dismissed on motion. *Marcy v. Citizens' Mutual Ins. Co.*, 429.
39. An appeal will not lie from an interlocutory judgment permitting a prayer for a jury to be filed and continuing the case, nor for sustaining a challenge to the array of jurors. If these orders have been improperly rendered they may be corrected on appeal from the final judgment. *State ex rel. McCarthy, v. Manning*, 453.
40. Where the certificate of the clerk of the District Court to a transcript of appeal makes no mention of any testimony having been adduced, and there are no bills of exceptions or assignment of errors in the record, the appeal will be dismissed on motion. *Melson v. Sandel*, 458.
41. Citation of appeal must be served on the appellee if he reside in the State, and on the advocate if he be a non-resident. Service on the the agent is not good. *McIntosh, Adm., v. McLeod, Adm.*, 465.
42. The appeal will be dismissed if the bond has not been filed within twelve months from the date of the order. Every act required by law to perfect an appeal when taken, must be performed within the delay allowed by law for taking the appeal. *Wood v. Calloway*, 481.
43. Where the creditors of a succession are litigating their rights contradictorily with each other and the value of the succession exceeds five hundred dollars, an appeal will lie to the Supreme Court although the claim of each creditor may not amount to that sum. *Succession of Gale*, 487.
44. Where the clerk of the District Court fails to reduce the testimony to writing and annex it to the record, in a suit founded on an opposition to an executor's account, the Supreme Court will remand the cause, with instructions to have the evidence reduced to writing. *Succession of Ross*, 511.
45. When an appeal is taken from a judgment on a joint contract, all who were required to be made parties in the court below must be made parties to the appeal, otherwise the appeal will be dismissed. *Noble v. Logan*, 515.
46. Where the order fixes the amount of the bond for a devolutive appeal, and the amount required by law for a suspensive appeal, and the bond is given for an amount less than that required by law for a suspensive appeal, the appeal will not be dismissed, but will be declared devolutive only. *Jenkins v. Howard*, 597.
47. Where one judgment debtor *in solido* appeals from the judgment without making his co-debtor a party, the appeal will be dismissed for want of proper parties. *Broussard v. Guidry and Dupre*, 618.

APPEAL—*Continued.*

48. The appeal will be dismissed where the failure to cite one of the appellees is imputable to the appellant. *Potier v. Thibodeau*, 618.
49. A third party, on appealing from a final judgment on the ground of his liability to contribute, must cite the plaintiff and defendant as appellees, otherwise the appeal will be dismissed for want of proper parties. *Gilbeau v. Cormier & Roy*, 629.
50. The fact that the name of the defendant is inserted in the appeal bond will not supply the defect. *Ib.*
51. The omission to ask for citation of the defendant in the appeal is imputable to the appellant. *Ib.*
52. An appeal from an interlocutory judgment will not be entertained, where it is not manifest that such decree would work irreparable injury. *Wolff v. McKinney*, 634.
53. Where judgment has been rendered in the lower court against the maker and indorser of a promissory note, and the maker appeals, he must make the indorser a party, otherwise the appeal will be dismissed for want of proper parties. *Sitting v. Littell*, 646.
54. The affidavit of the district judge, filed in the Supreme Court in 1867, stating that an appeal was granted in open court in 1862, is not sufficient to maintain the appeal in the absence of an order of appeal in the record. *Moore v. Simms*, 649.
55. An appeal will not be dismissed on the ground that the record was not filed on or before the return day when it is shown that there was no term of the court held at the time fixed, provided it was filed on the first day of the first meeting of the court after the appeal was taken. *Lefevre v. Haydel*, 663.
56. On a motion to dismiss an appeal, the Supreme Court will not notice documents not forming a part of the record. *Nunez v. Winston*, 606.
57. A clerk of the District Court is not disqualified on account of his office from becoming surety on appeal bond, in an appeal from a judgment from the court of which he is clerk. *Walker v. Simons*, 669.
58. If the clerk commit a clerical error of importance in issuing citation to the appellee, its only effect would be to require time to be given for a correct citation. *Ib.*
59. The filing of a transcript of appeal on the first day of the meeting of the court after the appeal is taken is sufficient. A party does not lose his right of appeal because of failure of the Supreme Court to hold the next regular term after it is taken. *Ib.*
60. The several acts of the Legislature passed in 1864, 1865 and 1866, providing for the return of appeals to the Supreme Court, were enacted in the liberal spirit of reinstating the right of appeal in all cases in which it had been lost or suspended by the disorgani-

APPEAL—Continued.

zation of the courts and the utter confusion and derangement of judicial proceedings consequent upon a state of war. These statutes should be construed liberally. *Arceneaux v. de Benoit*, 673.

61. Appeal granted since the first of September, 1860, and filed at the proper places of return, on or before the return day for such appeals, are in time, although the return may be made subsequent to the first Monday of March, 1866, to which time the right of appeal had been extended by the act of December, 1865. The act of March 22, 1866, is, in its spirit, an extension of the time beyond the first Monday of March, 1866. *Ib.*

62. A third party, appealing from a judgment, must allege and show a direct pecuniary interest in the subject matter of the suit.

State ex rel. Belden, Att. Gen., v. Markey, Kuizer, et al., 743.

63. The City of New Orleans has no pecuniary interest in the subject matter of a suit brought under the intrusion act, No. 156 of 1868, to determine the rights of parties to seats as Aldermen and Assistant Aldermen of said city. *Ib.*

64. Objections to the reception of testimony on trial in the lower court will not be noticed in the appellate court, unless the objections are embodied in a bill of exceptions to the ruling of the judge admitting the evidence. *Burke & Co. v. Edey & Pinckard*, 749.

65. When the appeal is taken for delay only, damages will be given against the appellant for frivolous appeal. *Ib.*

66. The appeal will be dismissed when the failure to make proper parties to the appeal is imputable to the appellant.

State ex. rel. Freret v. Wickliffe, Auditor, 755.

SEE ABSENTEES—*Parker v. Davis*, 157.

SEE CRIM. LAW AND CRIM. PRO.—*State v. Redding*, 188.

SEE EXECUTORY PROCESS—*Taylor v. Hill*, 626.

APPEAL BOND.

1. The rule laid down in article 575 of the Code of Practice, which requires that the appeal bond to be given for a suspensive appeal shall exceed by one-half the amount of the judgment appealed from, does not apply to a case where an appeal has been taken from a judgment homologating a tableaux filed by the executor. This class of cases is governed by the doctrine taught in *Blanchin v. Steamer Fashion*, 10 An. 345; *State ex rel. Hickey v. Judge of the Fourth District Court of New Orleans*, 20 An. 108, which may be rendered as follows: Where there is no standard specially fixed by law to the amount of the appeal bond required to operate a *supersedeas* pending the appeal, the judge *a quo* should allow a suspensive appeal on appellant's giving bond in an amount sufficient to cover costs.

State ex rel. Gausson v. Judge of Second District Court, 43.

APPEAL BOND—Continued.

2. After an appeal bond has been filed, the judge *a quo* is competent only to determine whether the appeal is suspensive or devolutive, and to ascertain whether the sureties on the bond are such as the law requires. *Ib.*
3. The Supreme Court will, on application for a prohibition, inquire into the sufficiency of the appeal bond to entitle the appellant to a suspensive appeal. *Ib.*
4. Where an appeal is granted on motion in open court, the names of the appellees must be inserted in the appeal bond, otherwise the appeal will be dismissed for want of proper parties.
Succession of Weigel, 149.
5. The Judge of the District Court is competent to determine the sufficiency of the security on appeal bond, after the appeal has been taken and filed in the Supreme Court, and if he finds the bond not such as the law requires, he may order execution to issue, notwithstanding the appeal.
State ex rel. Simonds v. Judge of Seventh District Court, 178.
6. An appeal bond is lawful and operative when signed by two or more sureties, who bind themselves each for a stated sum or portion of the bond, the aggregate amount of the respective sums being the full amount required by law.
State ex rel. Roman v. Judge of Sixth District Court, 443
7. Under the charter, the city of Carrollton is dispensed from giving bond in case of appeal.
Carrollton v. Board of Metropolitan Police, 447.
8. An appeal bond is valid if each of the sureties bind himself for half the entire amount.
State ex rel. Mitchell, Craig & Co. v. Judge Sixth Dist. Court, 730.
9. The Supreme Court will examine into the validity and sufficiency of the security of the appeal bond on an application for a prohibition, and if the bond is legal in form, and the security good and solvent, the prohibition will issue pending the appeal. *Ib.*
10. The appeal bond must be made payable to the clerk of the court from which the appeal is taken. The appeal will be dismissed if the bond is not so taken. *Marks & Co. v. Herman, 756.*

ATTACHMENT.

1. In an attachment suit, no judgment can be rendered against the garnishee before judgment is obtained against the debtor.
Collins & Leake v. Friend—Yeatman, Garnishee, 7.
2. To entitle the creditor to the remedy by attachment against a resident debtor, it must be shown that he is about leaving the State permanently. *Schorton v. Davis & Brother, 173.*
3. The bonding of the property attached by the defendant is not an acknowledgment that the writ of attachment providently issued.
Avel & Cambon v. Albo, 249.
4. The defendant in an attachment suit may have the attachment dissolved by a judgment of the court after he has come into the possession of the property attached, by giving bond for its release. *Ib.*

ATTORNEYS AND ATTORNEYS' FEES.

1. The stipulation in the act of mortgage of five per cent. to cover attorney's fees in case the holder is compelled to resort to legal proceedings to compel payment of the obligation, is not usurious.
Siegel v. Drumm, 8.
2. The attorney of record is not competent to make the necessary affidavit to obtain a trial by jury in a suit on a promissory note, where it is shown that the party resides in the parish and is within the limits of the parish at the time.
Wimbish v. Wade and Percy, 180.
3. The act of the Legislature of 1865 imposing a license tax on attorneys at law is equal and uniform on all persons engaged in the practice of the profession, and is therefore not in conflict with article 124 of the Constitution of 1864, nor with article 118 of the Constitution of 1868.
State v. King, 201.
4. The State, having authorized the issuing of a license to a party to practice law, is not thereby precluded from taxing such party annually for pursuing the profession within the State. *Ib.*
5. Where the authority of an attorney at law to appear in a cause is not questioned it will be presumed, and his acts will be binding on the party for whom he appears.
Rosenfield v. Adams Express Co., 233.
6. The instructions of the attorney of record, who placed the writ of *fi. fa.* in the hands of the sheriff, to retain it after the return day, will protect the sheriff from liability for failing to return the writ.
Simons v. Steamer White and Owners, 590.
7. The stipulation in the act of mortgage of two per cent. to cover attorney's fees, if resort be had to legal proceeding, is made in favor of the creditor, and is collectable with the principal debt.
Simon v. Haifleigh, 607.
8. In fixing the value of the services rendered by an attorney in a litigation in which he has been engaged, the court will not be governed exclusively by the estimate of the witnesses, but will look into the whole record and form an estimate founded on the usual charges made for such services as appear to have been rendered.
Cullom v. Mock, 687.
9. The averment in the petition that the defendants are non-residents is sufficient to authorize the appointment of an attorney to represent them in a proceeding *via executiva*. *Monition of Hall*, 692.
10. The court will notice judicially who are its attorneys, and where it appears that an attorney has been appointed *curator ad hoc*, the phrase *curator ad hoc* will be treated as surplusage and the appointment be regarded as that of attorney to represent the absentee. *Ib.*
11. The attorney appointed to represent the absentee in a proceeding *via executiva* is the proper party to whom notice of seizure must be addressed, and on whom service must be made. *Ib.*

ATTORNEY FOR ABSENT HEIRS.

1. The functions of the attorney for absent heirs ceases when the heirs present themselves, and are recognized and put into possession of the succession by order of the court.

Succession of McArthur, 432.

BAILMENT.

1. In order to avoid liability for the loss of cotton on storage, the warehouse keeper must show that the loss occurred without his fault. He cannot be relieved by showing that the loss occurred by an overpowering force. He must also show that he used all possible means to preserve it.

Schwartz, Kauffman & Co. v. Baer, 601.

2. A warehouse keeper gave a receipt to the depositor for cotton received on storage "with the stipulation in the receipt 'to be delivered in the same condition and order on presentation of this receipt or order.'" The depositor subsequently received a portion of the cotton, for which he gave a receipt. Held—That the presentation of the order and the delivery of a part of the cotton was a sufficient putting *in mora* of the whole amount to be delivered.

Juillard v. Baer, 603.

BANKRUPTCY.

1. A judgment and certificate of discharge by the Bankrupt Court will operate a perpetual bar to further proceedings in the State courts against the bankrupt, on demands that existed before the decree. Bankrupt act, sec. 34, approved March 4, 1867.

Fox v. Weed, 58.

2. An application for a new surrender of an insolvent is a new suit, and not a continuation of the first proceedings against the insolvent, and if not brought until after the passage of the bankrupt laws by the United States, cannot be entertained by the State courts.

Fisk v. Montgomery, 446.

3. The passage of the general bankrupt laws by the United States superseded all State insolvent laws. *Ib.*

SEE EVIDENCE—*Marcelin v. His Creditors*, 423.

BELLIGERENTS.

1. The exchange of prisoners between the sovereign and the insurgent, engaged on the one side by force of arms to subdue the rebellion, and on the other to establish their independence, does not of itself constitute the insurgent a belligerent power. *Smith v. Stewart*, 67
2. The blockade of the insurgent ports by the sovereign does not constitute the insurgent a belligerent, within the sense and meaning of the term "belligerent," as used in international law, because the sovereign might accomplish the same result by interdicting commerce through those ports by municipal regulations. *Ib.*

BELLIGERENTS—Continued.

3. The fact that a revolted province or portion of a country may have acquired the status and position of a belligerent power, does not *ipso facto* give it the position and status of a *de facto* government. A government *de facto* arises only where the established government has been subverted by successful rebellion, and the new government exercises undisputed sway for the time being over the entire country. *Ib.*
4. In the late conflict between the United States and the so-called Confederate States, before the Confederate States could have claimed the distinction of a *de facto* government, it was necessary for them to show undisputed control over the whole country claimed, with the ability to maintain that position. *Ib.*
5. A recognition, by any other independent power, of the Confederate States as an independent power before they had demonstrated their ability to maintain their new government, would have been a *casus belli* between the United States and such power. *Ib.*
6. Contracts entered into between belligerent enemies are absolutely null. *Overby v. Overby, 493.*
7. In the late civil war between the United States and the (so called) Confederate States, every individual within the military lines of the one, was a belligerent with reference to the other, and every contract between two parties, the one residing within the military lines of the United States and the other residing within the Confederate lines is absolutely null and void. *Ib.*
8. The contract of agency is included in the prohibitions established by acts of Congress and the proclamation of the President of the United States interdicting trade and intercourse between citizens of the United States and the insurgents, and is therefore void. *Ib.*
9. Contracts entered into during the late war between parties, the one residing within the military lines of the United States and the other within the Confederate lines of military occupation, are absolutely null, and no action will lie to enforce them. *Noblom v. Milborne, 641.*
10. A contract made between two parties, the one residing within the Federal lines of military occupation and the other within the so-called Confederate lines, during the late war, is prohibited by act of Congress, and is therefore null. *Noblom v. Swords, 647.*

BILLS AND PROMISSORY NOTES.

1. The holder of a promissory note, deposited before maturity, to secure the payment of a pre-existing debt, has a right to sue for and recover the whole amount. *Succession of Dolhonde, 3.*
2. A, a member of the commercial firm of A & B, executed his two promissory notes, payable to his own order and by him indorsed

BILLS AND PROMISSORY NOTES—Continued.

in blank, secured by mortgage on his individual property. A placed the notes in the hands of the commercial firm of A & B, who deposited them in pledge with C, to secure the payment of a note of the firm. The note of the firm was taken up by them, together with the mortgage notes held as collateral security; Held by the court—That the mortgage given to secure the notes of A, was not extinguished by confusion, they not having been returned into his hands. The fact that they were returned into the hands of the firm of which A was a member, did not place them in his individual hands, and the mortgage still exists. *Ib.*

3. The holder of negotiable paper must, in order to bind the indorser, give notice of non payment by the maker in conformity with the rules prescribed by the law merchant.

Field & Co. v. Delta Newspaper Co., 24.

4. The doctrine on which the necessity of notice to the indorser rests, is the presumption of damage or injury sustained by him. *Ib.*
 5. Whoever is entitled to a recourse over against another party, is presumed in law to be injured by a delay in receiving notice of non-payment. *Ib.*
 6. An engagement by one party to pay a certain amount of money to another at a given time, secured by mortgage on real estate, falls under the class or denomination of promissory notes, and is prescribed by the lapse of five years from maturity.

Bank of La. v. Williams, 121.

7. Where the evidence shows that the drawer of a draft payable at a future day has notified the drawees not to pay it, he is not entitled to notice of dishonor.

Marx v. Wheelis, 140.

8. One party cannot hold another liable individually, on a contract made with him as agent. *Ib.*

9. The transferee of drafts not negotiable occupies no better position than the original holder. *Ib.*

10. Where the signature of a party to a promissory note is specially denied under oath, the burden of proof falls upon the holder, who will be bound to produce such evidence as the law requires to enable him to recover on the instrument. C. P. art. 325.

Huddleston v. Coyle, 148.

11. In order to bind the drawer or indorser of a protested draft, notice must be directed to his postoffice. Notice sent to another postoffice than that of his domicile will not avail.

Lafitte, Dufilhoe & Co. v. Perkins, 171.

12. Where a party has purchased a tract of land and executed his promissory note for the price, and afterwards takes up the note by giving his draft for the payment thereof, with full knowledge of the condition of his title, he cannot set up in defense to a suit against him as drawer of the draft that the title to the land is defective or imperfect.

Wimbish v. Wade and Percy, 180.

BILLS AND PROMISSORY NOTES—Continued.

13. The attorney of record is not competent to make the necessary affidavit to obtain a trial by jury, in a suit on a promissory note, where it is shown that the party resides in the parish, and is within the limits of the parish at the time. *Ib.*
14. Payment of a promissory note cannot be judicially enforced where the consideration is shown to be the price of a sale of slaves.
Lytle v. Whicher, 182.
15. Consent to the extension of the time for the maturity between the maker and holder of a promissory note will hold the indorser conditionally liable, and notice of demand on the maker need not be given the indorser until the expiration of the new date caused by the extension.
Walker v. Graham, 209.
16. Where a promissory note is made payable at a particular place, as a bank, in an action against the maker, it is not necessary to allege or prove that demand of payment was made at that place to enable the holder to recover. 5 An. 61. *Thiel v. Conrad, 421.*
17. The maker of the note may, however, when sued, set up in defense that he had deposited the funds in the bank to meet the note at maturity, and show the damages he has sustained by the failure of the holder to demand payment at the place designated. *Ib.*
18. Want of due diligence in making demand of the maker of a promissory note at maturity, will discharge the indorser.
Mitchell v. Young, 278.
19. A promise by the indorser to pay the note, made in ignorance of his discharge, will not bind him. *Ib.*
20. An executor or administrator cannot bind the estate he represents by making or indorsing a promissory note in that capacity, but he will be held personally responsible for the amount, and the holder is not bound to allege or prove that the executor exceeded his powers in order to hold him personally responsible on the note.
Livingston v. Gaussen, 286.
21. The holder of negotiable paper, made or indorsed by a party as executor, may institute his action against such party individually, leaving to the latter the right to show that he is not personally responsible. *Ib.*
22. When a payment has been made on a promissory note which was given for the price of slaves, and a new note was executed for the balance due, the collection of the second note cannot be judicially enforced on account of the failure of consideration.
Campbell v. Waters, 325.
23. Notice to one member of a partnership which indorses a bill or note is notice to all, and if one of the firm dies before maturity, notice to the survivor will bind the estate of the deceased partner. *Parsons on Notes and Bills, vol. 1, p. 502.* Where a commercial partnership has been dissolved by the death of one of the partners,

BILLS AND PROMISSORY NOTES—*Continued.*

notice to the executor of the deceased partner will not bind the partnership on an indorsement of the firm name on a note made before the dissolution; in such a case notice should have been given to the surviving partner, espically if he be the liquidator or representative of the firm. *Slocomb v. De Lizardi*, 355.

24. The certificate of the notary that notice was given by a letter directed to the indorser's barkeeper, he not being in. is defective in not stating that the service was made at the indorser's residence or place of business. *Ib.*

25. A simple waiver of protest does not, as a general rule, dispense with demand and notice; but where a draft is made payable at a particular date, indorsed in blank by a commercial firm, and one of the firm writes on the back of it on the day of maturity, and only three or four hours before the usual time for protesting, "protest waived," he will be bound on the draft without further notice of its dishonor. *Marsh v. Waterman*, 375.

26. A waiver of protest and notice by an indorser, made at the place of payment, at the moment of maturity, will dispense with proof of other demand. *O'Leary v. Martin, Cobb & Co.*, 389.

27. Where a promissory note is indorsed in blank by a firm name, and a waiver of protest and notice is signed by the same firm, but in a different hand-writing from that of the original indorsement, and the note, indorsement and waiver are all offered and received in evidence without objection, the presumption is that the waiver was written by another member of the firm from that of the indorsement, and the signature will be considered proved. *Ib.*

28. Where the name of the holder of a promissory note appears as first indorser he will be presumed to be a surety with the maker. This presumption may, however, be rebutted by proof. *Ib.*

29. A party having given his promissory note for the price of land purchased, is debarred from setting up that the valuation of the land was estimated in a depreciated or unlawful currency. Nor can he set up that a previous holder was willing to take an unlawful currency in payment of the note. *Crosby v. Tucker*, 512.

30. A third holder of commercial paper before maturity is not compelled to prove that he gave a valid consideration to enable him to recover of the maker, unless it is shown that there is want or failure in the original consideration. *Union Bank v. Succession of Ross*, 513.

31. Notes given by the heirs for the price of slaves at probate sale can not be charged against them in the account rendered by the administrator. *Succession of Tauzin*, 536.

32. Where the mail service can not be used as a means of conveying notice, the holder of commercial paper is not excused if he fails to use all other means within his reach of bringing home notice to the party whom he wishes to charge. *James & Co. v. Wade*, 548.

BILLS AND PROMISSORY NOTES—Continued.

33. To hold the indorser on a promise to pay a promissory note after discharge, the holder must show that the promise was made with a full knowledge of his discharge. *Ib.*
34. When the defendant, the maker of a promissory note, establishes a failure of consideration as between himself and his payee, amounting to a fraud, the holder by indorsement is obliged to show that either he or some preceding holder took it in good faith and for value. *Union Bank of La. v. Ryan*, 551.
35. A third holder of a promissory note, given for the price of a slave can not recover thereon, although he acquired the note in good faith, for a valid consideration, before maturity. *Groves v. Clark and Carnal*, 567.
36. A commercial firm holding a note in favor of one of its members without indorsement, given for money loaned by the firm, can not set up that they are innocent third holders for value against the plea of failure of consideration. *Norton & Macauley v. Pickens*, 575.
37. The law makes no distinction in regard to prescription, between negotiable and non-negotiable promissory notes and bills of exchange. *Robichaud v. Thorne*, 611.
38. A written order drawn by one person addressed to another directing him to pay to a third party a certain amount of money at a specified time, is a bill of exchange, and is prescribed by the lapse of five years from date of maturity. *Ib.*
39. A third holder of negotiable paper before maturity, in good faith for a valuable consideration, can recover thereon, unless it is shown affirmatively that the original consideration was illegal. *Coco v. Calliham*, 624.
40. A promissory note, given for Confederate money as the consideration, can not be enforced in part, predicated upon an assumed value of the illegal currency at the time, when compared with legal currency. *Ib.*
41. A note given by a conscript in the so-called Confederate army to another party, to serve in his place as a substitute, is illegal and no action lies to enforce it. *Heidenreich v. Leonard*, 628.
42. A third holder of a promissory note, given for the price of a slave, cannot recover thereon, although he acquired it in good faith, for a valid consideration, before maturity. *Levy v. Gremillion*, 635.
43. Payment of a promissory note cannot be enforced when the consideration is shown to be the procuring, by the holder, a detail for the maker to enable him to keep out of the active military service in the rebellion. *Eastin v. Ducrest*, 656.
44. A written agreement to pay a certain amount of money to another, styled a bond, falls under the class or denomination of promissory notes and is prescribed by the lapse of five years from maturity. *Succession of Voorhies*, 659.
45. Notes given for the price of slaves cannot be enforced. *Nunes v. Winston*, 666.

BILLS AND PROMISSORY NOTES—Continued.

46. The maker of a promissory note can not set up in defense to its payment that the holder is not the true owner, unless he show that the assignment or transfer is fictitious and fraudulent, and made to deprive him of substantial defense against the true owner.

Case, Receiver, v. Watson & Dunham, 731.

47. Where a contract of sale of land, slaves and personal property was made for part cash and part credit, for which promissory notes were executed by the purchaser, due at different periods of time before emancipation, and a portion of the notes for the credit price have been paid, the purchaser of the property for which the notes were executed, is only bound to pay that portion of the outstanding notes after emancipation which is found to be due on the land and personal property, in the proportion of the value of the land, slaves and personal property in the original contract of sale.

Sandidge v. Sanderson, 757.

48. The holder of a mixed obligation, the consideration of which is part land and part slaves, cannot recover that portion for which slaves formed the consideration. Constitution, art. 128. *Ib.*

SEE AGENT AND AGENCY—*Nalle v. Higginbotham, 477.*

SEE CONTRACTS—*Satterfield v. Spurlock, 771.*

SEE PRACTICE—*Taylor v. Little, 665*

BILLS OF CREDIT.

1. The certificate of indebtedness or notes authorized by the act of the General Assembly, approved ninth of February, 1866, are bills of credit, and are issued in violation of section 10, of article 1, of the Constitution of the United States.

City National Bank v. Mahan, Tax Collector, 761.

2. These certificates of indebtedness or bills of credit having been issued in violation of the prohibitions in the Constitution of the United States, are not receivable for taxes or other public dues to the State.

Ib.

3. That the act of the General Assembly approved ninth of February, 1866, entitled, "An act to authorize the issue of certificates of indebtedness, and of bonds for the funding of the same," is in conflict with article 1, section 10, of the Constitution of the United States, and is therefore void.

Ib.

BONDS.

1. The law of 1856, section 131, page 136, exempting the city of New Orleans from giving bond in litigations to which she is a party, does not apply to the Treasurer or other officers of the city. The statute exempting the corporation from giving bond is an exceptional one and cannot be extended to other parties than those mentioned.

State ex rel. George V. Mount, City Treasurer, 177.

SEE APPEAL BONDS.

CITATION.

1. Proof of citation can only be shown by the Sheriff's return, and nothing can be presumed by the court.
Leblanc & Co. v. Ferroux, 26.
2. The Sheriff's return on a citation cannot be amended or corrected after judgment, so as to cure nullities resulting from a defective citation. *Ib.*
3. The power to receive citation for another must be express and special; it cannot be conferred by a general mandate. C. C. 2965, 2966. *Ib.*
4. When parties have elected a domicile as a place to receive citation, the Sheriff's return must show that the service was made at the elected domicile in the manner prescribed by law. *Ib.*
5. The return of the Sheriff on a citation served at the domicile of the defendant must show that the citation and copy of petition were served on a person of lawful age, who resided at the domicile of the defendant at the time. *Cole v. Hocha*, 613.
6. No valid judgment can be rendered against a party until he has been legally cited. *Ib.*
7. A judgment by default that has been improperly made final because of defective citation, will be set aside on appeal, and the cause will be remanded. *Dupuy v. Arceneaux*, 629.
8. A citation must express the number of days given the defendant to answer according to the distance from his residence to the place where the court is held, to be reckoned from the date of service. *Ib.*
9. In a service of citation at domicile, the Sheriff's return must show that the defendant was absent at the time, and that the person with whom the citation was left, was living there.
Arnault v. Julien, 630.
10. No legal judgment can be rendered on a defective citation. *Ib.*

CLERKS OF COURT.

1. Section four of the act of the Legislature, approved September 4, 1868, making the clerks of District Courts *ex officio* clerks of the Parish Courts, is in conflict with article 117 of the Constitution of 1868, which declares that "No person shall hold or exercise, at the same time, more than one office of trust or profit, except that of justice of the peace or notary public."
Bouanchaud v. D'Hebert, 138.
2. Section 9 of the same act conflicts with article 86 of the Constitution which declares that the Parish Judges of the several parishes shall receive a salary and fees to be provided by law. The above numbered sections of the act No. 51, approved September 4, 1868, are unconstitutional and void. Constitution, articles 86 and 117. *Ib.*

CLERKS OF COURT—Continued.

3. A clerk of the District Court is not disqualified on account of his office from becoming surety on an appeal bond in an appeal from a judgment from the court of which he is clerk.

Walker v. Simon, 669.

4. If the clerk commit a clerical error of importance in issuing citation to the appellee its only effect would be to require time to be given for a correct citation. *Ib.*

COMMISSION MERCHANTS.

SEE AGENCY—*Poindexter v. King*, 697.

COMMON CARRIER.

1. Where a railroad company, engaged in the carrying trade as common carriers for hire, receives and receipts for property to be transported to another point on the line of the road, the burden of excusing its non-delivery at the point designated falls on the company.

Chapman v. Jackson Railroad Co., 224.

2. A common carrier is responsible to the shipper or consignee for the non-delivery of goods which has occurred through his fault or negligence.

Simon & Loeb v. The Fung Shuey, 363.

3. The omission of the consignee to institute proceedings to recover goods which have been stolen from the ship before delivery, will not relieve the carrier from the damage resulting from the failure to deliver. *Ib.*

4. The estimate of damages for the loss of goods by the carrier is their net value at the port of destination. *Ib.*

5. A steamboat engaged in carrying cattle or other live stock from different ports of the country to New Orleans, for market, is responsible for the loss of the cattle while on board, when it has occurred through carelessness or negligence. *Pitre v. Offut*, 679.

6. It is no defense in case of loss while the stock is on board, for the boat to show a custom to the effect that they took no risk in case of losses of this kind. To make the defense good that such a custom prevailed, it must be shown that the shipper had full knowledge of the custom at the time of shipment, and that he delivered the stock on board with reference to the custom. *Ib.*

COMMUNITY.

1. The surviving wife, being a partner in community, is competent to purchase property at probate sale, which she administers as executrix. Acts of 1855, page 78, section 8.

Keller v. Blanchard, 38.

2. The power of the husband to dispose of the community property is limited to that of alienation by sale or otherwise where an equivalent in value is impliedly received for the property disposed of.

Bister v. Menge, 216.

COMMUNITY—Continued.

3. The husband is prohibited from making any conveyance *inter vivos* of the immovables of the community by a gratuitous title. *Ib.*
4. At the dissolution of the community the wife is entitled to one-half of the immovables disposed of by the husband, by onerous titles in fraud of her rights, and she may enforce them directly against the parties in possession. *Ib.*
5. A lease by the husband of immovables belonging to the community for a term of years, in the form of a donation *inter vivos*, will fall if the donor dies before the expiration of the time. *Ib.*
6. The paraphernal property of the wife can not be seized for a debt due the community, growing out of improvements made upon her hereditary lands, until her indebtedness to the community is judicially established. *Abat v. Atkinson, 239.*
7. Where community property has been sold and the proceeds applied to the payment of community debts for which it was mortgaged, the minors can not claim restitution *in integrum* without showing injury from the sale, and paying or tendering the amount which has inured to their benefit. *Coulson v. Wells, 383.*
8. A sale of community property by the husband, after the death of the wife, only conveys title to one undivided half thereof. *Biossat, Tutor, v. Sullivan, 565.*
9. A decree of the court homologating the proceedings of a family meeting which authorized the adjudication of the community property to the surviving parent on the estimate of the inventory, amounts to a sale of the property to the survivor, and not a judgment for money on which execution could issue. *Heirs of Bedell v. Hayes, Tutrix, 643.*
10. The heirs of a deceased parent can not recover from the survivor, who has purchased the community interest of the deceased, that portion of the price which is shown to be for slaves belonging to their deceased parent. *Ib.*
11. The surviving husband having qualified as natural tutor to his minor children, and caused an inventory of the community property to be made, and on that basis caused the one-half interest of the wife in the community to be adjudicated to him, for which he executed a special mortgage in favor of the heirs on his own property, and he dies, and a dative tutor is appointed to represent his minor children; the dative tutor, thus appointed, may vote at the deliberations of the creditors to dispose of the property of the deceased, an insolvent. *Deblanc v. Gary, 689.*

CONFEDERATE TREASURY NOTES.

1. Contracts growing out of the use of Confederate Treasury notes as a medium of exchange cannot be judicially enforced. 19 An. 268, 288, 859; Constitution of 1868, article 127. *Barrow v. Pike, 14.*

CONFEDERATE TREASURY NOTES—Continued.

2. Contracts or transactions, the basis of which was Confederate Treasury notes, cannot be judicially enforced by the courts of this State. 19 An. 161, 164, 186, 196, 269, 288, 359, 432, 464; Constitution of 1868, article 127.

Bank of West Tenn. v. Citizens' Bank of La., 18.

3. Payment to the administrator in Confederate Treasury notes of a debt due to the estate will not shield the debtor from liability.

Draughan v. White, 175.

4. A deposit in the Bank of New Orleans in 1862, in checks and drafts drawn by the Union Bank of Nashville, and by citizens of Tennessee, during the time that Confederate Treasury notes were shown to be bankable funds in New Orleans and Nashville, must be considered as having been made in such funds.

Foster & McAllister v. Bank of N. O., 388.

5. A depositor of funds in Confederate Treasury notes, while such notes were shown to be bankable funds, cannot recover, from the bank in money, the amount so deposited, *Ib.*

6. Where a party purchased checks drawn by one bank on another, and drafts drawn by one party on another, all within the Confederate lines at the time, and paid for them in Confederate Treasury notes, he must be considered as *particeps criminis* in giving credit to that currency, and is without the capacity to obtain the enforcement of any contract or obligation growing out of such transaction *Ib.*

7. Courts of justice will not lend their aid to settle disputes growing out of contracts reprobated by law. *Boyd v. Chaffe*, 476.

8. The enforcement of contracts by the courts of this State, the consideration of which was Confederate notes, is prohibited. *Ib.*

9. Payment of a legacy to a minor in Confederate notes is not binding on the legatee for the reason of incapacity to give consent.

Porter v. Brown and Chaler, 532.

10. An agreement to sell, where the consideration is shown to be Confederate Treasury notes, will not be enforced.

Biossat, Tutor v. Sullivan, 565.

11. Where the evidence shows that a lot of sugar has been sold, and a portion of the price agreed upon has been paid in Confederate notes, no action will lie to enforce payment of the balance of the alleged price. *Fournet v. Beer*, 658.

SEE ACTION—*Juillard v. Rogay*, 259.

" **BILLS AND PROMISSORY NOTES—***Coco v. Oakham*, 624.

" **EXECUTORS AND ADMINISTRATORS—***Succession of Sprowl*, 544.

" **PARTNERSHIP—***Succession of Wilder*, 871;

CONFEDERATE OBLIGATIONS.

1. Two parties, A and B, were engaged as partners in the cotton trade, one residing within the Federal lines of military occupation and the other in the Confederate lines, during the late war, between whom all trade was interdicted. They engaged the services of C to haul the cotton through the lines. Held—That, C could not recover wages, on the ground that he was engaged in illicit traffic, expressly prohibited by law. *Williams v. Gay*, 110.
2. All contracts and transactions between parties in aid of the Confederate struggle in the late conflict between the United States and the so-called Confederate States, are contrary to good morals and public policy, and cannot be judicially enforced. In all such cases the parties engaged will be left where their conduct has placed them. *Haney v. Manning*, 166.
3. Where the consideration of a promissory note, secured by a mortgage on real estate, is shown to be Confederate treasury notes the holder can not enforce the mortgage rights against the property mortgaged, nor recover on the note. *Seuzeneau v. Saloy and Sheriff*, 305.
4. Abat, Generes & Co., commission merchants in the city of New Orleans, received, in 1862, of Anatole Cousin, a customer of theirs, the sum of \$16,715, in notes of the so-called Confederate States, to be invested in city bonds and notes secured by mortgage. The notes were invested in bonds of the city, known as Defense Bonds, which were redeemable in the same kind of currency. Cousin brings suit for the amount delivered. Held—That the entire transaction, being in Confederate notes, was illegal and null. 19 An. 161, 288, 359; Constitution of 1868, article 127.
Cousin v. Abat, Generes & Co., 705.
5. The organization known as the Confederate States never reached the dignity of a *de facto* government. *Id.*
6. The order of Major General Butler compelling the holders of City Defense Bonds to pay a certain per cent. thereof for the benefit of the poor of New Orleans, was punitive, and no action lies to recover the amount of such assessment. *Id.*

SEE PARTNERSHIP—*Mc Williams v. Bryan & Irvine*, 211.

CONSTITUTION.

1. The constitution of the State of Louisiana, adopted in 1864, was provisional in its character, and the legislation had under it partook of the same nature. *Police Jury v. Heirs of Burthe*, 325.
2. The convention that formed the constitution of 1868 was competent to annul or continue in force any of the provisions of the constitution of 1864, or the laws passed thereunder. *Id.*

CONSTITUTION—Continued.

3. The act of the Legislature of 1855, authorizing the imposition of a license tax of one thousand dollars on each insurer or insurance company chartered by the State, and only imposes a license tax of five hundred dollars on each insurance company chartered by the laws of the State, is not in conflict with that provision of the constitution which requires that taxation shall be equal and uniform

State v. Fosdick, 434.

4. An agent of a foreign corporation domiciliated and doing business in this State cannot invoke the inhibiting clauses of the constitution of the United State against acts of the Legislature which it is alleged discriminate between citizens of this State and those of the other States of the Union. *Ib.*

5. Article 128 of the State constitution of 1668, in declaring that "contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State," does not impair the obligations of a contract. It merely prohibits the execution of contracts that have been declared void by the sovereign power.

Armstrong v. Lecomte, 527.

5. A third holder of a negotiable paper before maturity is not excepted from the prohibition. *Ib.*

6. The prohibition against the enactment of laws impairing the obligations of contracts has no application to the sovereign power. *Ib.*

7. Courts will not declare an act of the Legislature void unless its unconstitutionality is established beyond all reasonable doubt.

Edwards v. Dupuy, 694.

8. The act of the Legislature of 1869, No. 110, entitled "An Act to amend and re-enact sections four and nine of an act entitled an act to organize the parish courts of this State," etc., is constitutional. See *Hawley v. Barlow*, 563. *Ib.*

9. The act of the General Assembly, approved ninth of February, 1866, entitled "An Act to authorize the issue of certificates of indebtedness, and bonds for the funding of the same," is in conflict with article 1, section 10, of the constitution of the United States, and is therefore void.

City National Bank v. Mahan, Tax Collector, 751.

SEE CRIMINAL LAW AND CRIMINAL PROCEEDINGS—*State v. Jackson*, 574.

CONSTRUCTION, RULES OF.

1. The term "each house" used in articles 33 and 42 of the Constitution of 1868, means a majority of the members elected to either body. *Frellsen v. Mahan*, 79.

2. Four-fifths of a *quorum* of each house may dispense with the rule requiring any bill to be read on three several days. *Ib.*

3. In ascertaining the meaning of a statute, the rule is well settled, that it should be so construed, if possible, that no clause, sentence, or word, shall be superfluous or insignificant. *Staes v. Gastinel*, 407.

SEE LAWS—*Arrowsmith v. Durell*, 295.

CONTRACTS.

1. Solidarity is never presumed; it exists, if at all, when several persons bind themselves towards another for the same sum, at the same time and in the same contract.

Stowers v. Succession of Blackburn, 127.

2. A lumber dealer cannot recover from the proprietor, who is having a building erected under contract, the price of lumber which he has furnished to the builder, unless he shows that the proprietor is indebted to the builder.

Heuchert v. Barrer, 387.

3. Courts of justice will not extend relief to a party against his own contract without exacting justice from his adversary.

Lotham v. Hickey, 425.

4. A contract that cannot be enforced against the principal for want of a lawful cause, can not be enforced against the vendee of the principal.

Boyd v. Chaffe, 475.

5. Courts of justice will not lend their aid to settle disputes growing out of contracts reprobated by law.

Id.

6. The enforcement of contracts by the courts of this State, the consideration of which was Confederate notes, is prohibited.

Id.

7. Delivery is of the essence of a contract of deposit, and where cotton was to be weighed, no delivery could take place until it was weighed.

Tanneret v. Marshall, 519.

8. Where the evidence shows that a sum was paid in Confederate notes, for a lot of cotton, no action will lie to enforce the contract for the recovery of the cotton or its value.

Id.

9. A conversation between one party to a contract and a third party, out of the presence of the other party, is inadmissible on a trial in a suit to enforce the contract.

Bethel v. Hawkins, 620.

10. Where a sale of land and slaves was made before emancipation, and notes were executed for the price, and the purchaser afterwards recovers or retrocedes to the vendor a portion of the slaves at a fixed price, and a credit is given to the purchaser on a particular obligation of his, given to the vendor as a part of the price of the sale, the vendor is bound by the act, although emancipation had taken place before it was passed. The vendor, having agreed to and accepted the retrocession, can not afterwards invoke its immorality and nullity to avoid its effect.

Sutterfield v. Spurlock, 771.

11. In a suit to enforce a contract founded on a mixed consideration, part land and part slaves, if the evidence fails to show what portion is for land and what for slaves, the case will be remanded for the purpose of ascertaining by evidence the relative proportions of each.

Id.

See ACTION—*Gosselin v. Womack*, 193.

See BELLIGERENTS—*Overby v. Overby*, 493.

See BELLIGERENTS—*Moblom v. Melborns*, 641.

See BELLIGERENTS—*Noblom v. Swords*, 647.

See BILLS AND PROMISSORY NOTES—*Sandidge v. Sanderson*, 757.

See SOVEREIGN POWER—*Dranguet v. Rost*, 538.

CORPORATIONS.

1. Paragraph 12 of section 7 of the charter of the city of Jefferson (Laws of 1867, No. 57,) requires that all contracts for opening, widening, paving and improving the streets, authorized by the Common Council shall be adjudicated by the Controller, under regulations prescribed by the Council, *to the lowest bidder*. An adjudication by direction of the Council, by the Controller, of a contract for paving one of the streets of the city with the *Nicolson pavement* to a firm or company having the exclusive right to make such pavement within the limits of the State of Louisiana, is in conflict with this provision of the statute; and the owners of property fronting on the street paved with this kind of pavement by a company having the exclusive right, cannot be compelled to pay the two-thirds of the cost of making the pavement. *Bennett v. City of Jefferson*, 143.
2. The principle competition enunciated by the statute must be observed by the Council in letting out contracts for the improvement of the streets, otherwise the owners of property fronting on the streets improved cannot be compelled to pay the charges assessed against them for making the improvement. *Ib.*
3. The omission in the Constitution of 1868 of article 133 of the Constitution of 1864, left the whole subject of the corporation of the city of New Orleans and its police regulations under the power and discretion of the Legislature. *Diamond v. Cain*, 309.
4. Act No. 1, approved July 9, 1868, creating a Board of Police Commissioners for the city of New Orleans and giving them full power to remove and appoint the police force, and repealing all other acts and parts of acts in conflict with its provisions, divested the Mayor of the city of New Orleans of all authority to appoint a chief or other policeman. Articles 159 and 42 of the Constitution of 1868 were not violated in the passage of this act. (See acts Nos. 74 and 145 of 1868, and Nos. 60 and 92 of 1869.) *Ib.*
5. The appointment of a chief of police by the Mayor of the city of New Orleans after the passage of act No. 1, approved on the ninth of July, 1868, was without any legal force or effect, and such officer so appointed had, by virtue of his appointment, no interest in the office of chief of police, nor in the office of superintendent of metropolitan police created by act No. 74, approved September 14, 1868. Having no interest in the office, he was not entitled to the writ of *quo warranto* nor injunction. *Ib.*
6. The Common Council of the city of New Orleans have no power to fill vacancies in offices of the corporation arising from death, resignation or otherwise. In such cases it is made the duty of the Governor to appoint for the unexpired term. *State ex rel. Belden, Att'y Gen., v. Leovy*, 538.
7. The city of Shreveport has no control over the public ferries across the Red River beyond the limits of the corporation. *O'Neil v. Police Jury*, 586

CRIMINAL LAW AND CRIMINAL PROCEEDINGS.

1. In providing against the crime of arson, our statute makes no distinction in reference to the ownership of the house or building destroyed by fire, whether belonging to the accused or to a third person. And the only object of the allegation of ownership of property in the indictment is to describe and identify the object of the crime.
State v. Elder, 157.
2. The possession, occupancy and control of a house or barn and stable that has been destroyed by fire, may be shown by parol evidence in the prosecution of a party charged with the crime of arson. *Ib.*
3. Under the statute of 1855, page 137, providing against the crime of arson, the State will be allowed to amend the bill of indictment in all matters relating to the form thereof. *Ib.*
4. After the jury was empaneled and the trial commenced, the District Attorney moved to amend the indictment by inserting the words "the aforesaid barn and stable being," which was allowed by the court. Held—That this amendment does not alter the substance of the indictment, or create a new or different charge. *Ib.*
5. In a criminal case, not capital, where a fine above three hundred dollars has not been imposed, the appeal will be dismissed for want of jurisdiction. Constitution, art. 74. *State v. Redding, 188.*
9. Where one of the panel of the grand jury is disqualified, any indictment found by them is null and void, and the accused may raise the objection and show the fact after verdict.
State v. Parks, 251.
7. A party convicted by a jury, on the information of the District Attorney, of the crime of larceny, cannot urge in arrest of judgment that the charge of burglary is not properly set out in the information.
State v. O'Brien, 265.
8. In criminal cases the Supreme Court has jurisdiction on questions of law only. Constitution, art. 74. Questions of continuance, and the grounds of the motion to quash, depending solely on facts, cannot be examined on appeal. *State v. Watkins and Nelson, 290.*
9. In capital cases, jurors are not permitted to separate after they have been sworn. *State v. Evans, 321.*
10. A verdict of guilty of a capital offense will be set aside, and a new trial ordered where the jury have separated after they were sworn and before verdict. *Ib.*
11. In cases not capital the jury may be allowed to separate at the discretion of the judge before verdict. *Ib.*
12. The bill of indictment under the seventh section of the act of the Legislature, approved March 14, 1855, must charge the accused with two specific acts, the concurrence of which, in point of time, creates a capital offense.
State v. Brown, 347.

CRIMINAL LAW AND CRIMINAL PROCEEDINGS—Continued.

13. Where the indictment under this statute fails to set out the two distinct offenses which constitute the crime against which it is aimed, but sufficiently describes the offense of burglary, and a verdict of guilty of a capital offense has been returned by the jury, and sentence is pronounced thereon by the court, the case will be remanded for sentence in accordance with the formalities prescribed against the crime of burglary. *Ib.*
14. The bill of indictment for the crime of embezzlement must designate the thing embezzled. Charging the accused with the embezzlement of the sum of eleven dollars is insufficient to hold the prisoner. *State v. Muston, 442.*
15. Declarations or threats of the deceased towards the accused, in order to constitute a part of the *res gestæ*, must be made at the time of the act done which they are supposed to characterize, and so to harmonize with it as to constitute one transaction. *State v. Gregor, 473.*
16. Declarations by the deceased to witness, towards the accused, made before the homicide and not communicated to the accused, do not form a part of the *res gestæ*, and are therefore inadmissible on that ground. *Ib.*
17. Declarations or threats made to third parties by the deceased towards the accused before the homicide, are not admissible without first showing that they were communicated to the accused before the killing. *Ib.*
18. The order of the District Judge overruling a motion for a new trial in a criminal case on the affidavit of newly discovered evidence, presents the question of diligence, and not an unmixed question of law, and cannot be reviewed on appeal. *Ib.*
19. Where two parties are tried together for the crime of murder, each one is entitled to twelve peremptory challenges to the jurors. In such a case the privileges of the one must not be prejudiced by the acts of the other. *State v. McLean and Hamilton, 516.*
20. The objection that one of the petit jurors was not a registered voter, comes too late if not made until after verdict. *Ib.*
21. The statute of the State of Louisiana of 1855, authorizing prosecutions by the District Attorney on information, is not in conflict with the fifth amendment to the Constitution of the United States, which declares "that no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment by a grand jury." The restriction by this amendment to the Constitution of the United States has no application to the State courts. *State v. Jackson and Smith, 574.*
22. An order of the judge authorizing the sheriff to discharge the prisoner on giving bond in a fixed amount, is a sufficient authority to the sheriff to receive the bond and file it in court, and the

CRIMINAL LAW AND CRIMINAL PROCEEDINGS—Continued

sureties on the bond having obtained the prisoner's release, on this construction are debarred from setting up this defense in a suit for the forfeiture of the bond. *State v. Loeb*, 599.

23. The condition in a bond of release "that the prisoner shall not depart without leave of the court," will bind the sureties, although the defense is not accurately described in the body of the bond. *Id.*

24. All objections to the informalities which may have occurred in the formation, drawing or summoning of the grand jury must be made on the first day of the term of the court and not afterwards.

State v. Hoffpauer, 609.

25. Where the venire from which the grand jury is drawn is composed of legally qualified jurymen, it will not be set aside on objections made after the first day of the term. *Id.*

CURATOR AD HOC.

1. Where a party, while residing in New Orleans, executed a mortgage on his property there, and afterwards by his own voluntary act, leaves the State, and remains away for nearly two years, having left no agent in charge of his property, or authorized to represent him, nor housekeeper in possession of his former residence, with no known intention of returning to the State at any future time, he must be regarded and treated by the mortgage creditor as an absentee, who, in a suit against the property mortgaged may cause a curator *ad hoc* to be appointed to represent the absentee, with whom proceedings may be conducted contradictorily, and the property seized and sold to satisfy the mortgage rights.

Lasere v. Rochereau & Co., 205.

DAMAGES.

1. Damages will not be allowed for frivolous appeal unless prayed for in the answer to the appeal. *Siegel v. Drumm*, 8.

2. Where the appeal is manifestly taken for delay, the judgment appealed from will be affirmed with damages for frivolous appeal.

Williams v. Woodman, 50.

3. In an action for damages for slander where the verdict of the jury is manifestly contrary to law and the evidence, the Supreme Court will not undertake to assess the damages, but will remand the case for a new trial.

Coussirat v. Olivier, 50.

4. Where damages are claimed on a reconventional demand, the evidence must fix the amount with certainty and clearness.

Lallande v. Ball, 185.

5. Damages will be adjudged against the appellant for frivolous appeal when the record shows no grounds for a reversal of the judgment; and it is manifest the appeal was taken for delay.

Friedman & Co. v. Houghton, 200.

DAMAGES—Continued.

6. A newspaper is not liable in damages for libel in publishing the testimony of witnesses given before an investigating committee of the Congress of the United States. In giving publicity to such evidence through the newspapers the privilege of the press is not abused.
Terry v. Fellows, 375.
7. Where the appellant fails to appear and prosecute the appeal, and the record discloses no grounds of appeal, damages will be awarded the appellee as for frivolous appeal.
Piper v. Succession of Pickens, 386.
8. Co-trespassers are liable *in solido*, and citation of one will interrupt prescription to all. In an action in damages for trespass, the defendant is not permitted to attack plaintiff's title, or establish title in himself.
Frazier v. Hardee, 541.
9. Damages will be allowed the appellee when prayed for, if the record shows no legal ground for taking the appeal.
Ewing v. Root, 683.
10. An allegation of damages, unsupported by evidence on trial in the court below, will not be considered in estimating the amount in controversy necessary to give the appellate court jurisdiction.
Pritchard v. Parker, 745.

DEDICATION TO PUBLIC USE.

1. In the dedication of lands for the public use, no particular form need be observed; all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation.
Baton Rouge v. Bird, Sheriff, 244.
2. Where a dedication to public use of lands in squares, designated by metes and bounds is shown, and private individuals acquire the lands adjoining and surrounding it, with reference to the boundaries thereof, the lands so dedicated to the public use are out of commerce, and are not subject to individual or private ownership
Ib.

DE FACTO GOVERNMENT.

SEE BELLIGERENTS—*Smith v. Stewart*, 67.

SEE CONFEDERATE OBLIGATIONS—*Cousin v. Abat, Generes & Co.*, 705.

DISTRICT COURTS OF NEW ORLEANS.

1. Under the act of the General Assembly, No. 16, approved February 5, 1869, the District Courts of the parish of Orleans, except the First and Second District Courts, are required to be kept open on all legal days, except from Christmas to the second of January, from the first Monday of November until the fourth day of July, and for the purpose of considering writs of arrest, habeas corpus, mandamus, etc., they are required to remain open on all legal days during the

whole year; and any judgment rendered on mandamus or other conservatory proceeding, out of term time, may be appealed from on motion in open court, the same as though it had been rendered in regular term.

State ex rel. New Orleans v. Judge Sixth District Court, 733.

DISTRICT JUDGE.

1. Whenever the Judge of the District Court is personally interested in the suit, he shall call upon the parish judge of the parish where the suit is pending to try the case. Constitution of 1868, art. 90.

State ex rel. Welsh v. Judge Ninth Judicial District, 51.

2. The District Judge has no discretion in granting a suspensive appeal, where the appellant tenders his bond with legal surety for an amount exceeding by one-half the amount of the judgment.

State ex rel. Adams v. Judge Second Judicial District, 64.

3. The Judge of the District Court is competent to determine the sufficiency of the security on an appeal bonds, after the appeal has been taken and filed in the Supreme Court, and if he finds the bond not such as the law requires he may order execution to issue, notwithstanding the appeal.

State ex rel. Simonds v. Judge Seventh District Court, 178.

4. In a dispute about the ownership of a schooner, the opinion of the judge *a quo* on the questions of fact is entitled to great weight, when sustained by the testimony offered and in the record, without objection from the opposing party. *Gogreve v. Windhorst*, 296.

5. The District Judge is without authority, either on his own motion or by the consent of parties, to transfer a suit from the parish of the domicile of the defendant to another parish of the State. All proceedings had in a cause after such transfer are null.

State ex rel. Twichell v. Head, 550.

DOMICILE.

1. A party cannot be sued at any other domicile or before any other court than the one having jurisdiction over the place of his residence.

State ex rel. Sandlin v. Judge of Eleventh Judicial District, 258.

2. By the provisions of the act of the Legislature, approved April 18, 1861, No. 173, any party, defendant, is prohibited from electing any other domicile than that of his residence for the purpose of being sued. Acts of 1861, 137. *Ib.*

DONATION.

1. A donation which acknowledges an indebtedness to the heir, but declares that it is given as an extra portion and not to be accounted for at the partition of the donor's estate, is presumed to be fraudulent. C. C. p. 1975. *Chase v. McCay*, 196.

DONATION—Continued.

2. A judgment creditor can have a donation *inter vivos* made by his debtor in fraud of his rights annulled, and have the property donated made liable for his debt, provided the donor fail to show other immovable property, unincumbered, to an amount sufficient to pay the debt. *Ib.*

EMANCIPATION.

SEE ACTION—*Gosselin v. Womack*, 193.

“BILLS AND PROMISSORY NOTES—*Sandidge v. Sanderson*, 757.

CONTRACTS—*Sutterfield v. Spurlock*, 771

“SUCCESSIONS—*Succession of Putin*, 651.

EVICITION.

1. A purchaser of real estate can not postpone the payment of the price until the decision of the suit for eviction, when the nature of the title on which the suit for eviction is founded is set out and described in the act of sale. *Boisblanc v. Markey*, 721.

EVIDENCE.

1. The opinions of medical men are received upon questions of professional skill; but they should state the facts on which such opinions are based, and the opinions themselves are not conclusive, but must be weighed as other evidence. *Chandler v. Barrett*, 58.
2. A party will not be permitted to prove what he has not alleged in his petition. *Dufilhoe & Co. v. Perkins*, 171.
3. A receipt given for money is not conclusive, and may be explained by parol testimony. *Draughan v. White*, 175.
4. The interruption of prescription may be proved by parol testimony. *Bernstein v. Ricks*, 179.
5. Where the evidence leaves it in doubt whether the parties engaged in cotton transactions during the late war did not fall within the prohibitions of trade and intercourse placed on citizens by the United States, the case will be remanded to give both parties an opportunity of offering evidence on the point. *Pratt v. Draughon*, 194.
6. In a suit on a promissory note which expresses on its face “for value received,” the burden of showing want or failure of consideration falls on the defendant. *Friedman & Co. v. Houghton*, 200.
7. A settlement of business transactions between parties by one giving his note for the balance due, will be conclusive where the proof in the record shows that no error occurred in the settlement. *Douglass v. Manning*, 231.
8. The fact of non-delivery of goods shipped must be shown before the owner or shipper can recover their value from the carrier. *Schneideau & Co. v. Pennington & Glidden*, 299.

EVIDENCE—Continued.

9. In an action in damages for slander, the burden falls on the plaintiff of showing that the language complained of was used by the defendant, and with malicious intent. *Toye v. McMahon*, 205.
10. Credits on the back of a promissory note, to be evidence against the maker, must be shown to have been placed there with his knowledge and consent. *Boulin v. Rainey*, 325.
11. Evidence will not be admitted to establish a fact not alleged in the pleadings. *Caldwell & Shannon v. Neil Brothers*, 342.
12. Parol evidence is inadmissible to prove any acknowledgement or promise of a party deceased to pay any debt or liability against his succession. *Succession of Hillebrandt*, 350.
13. Evidence is not admissible to establish a special defense under the general issue. *Marsh v. Waterman*, 377.
14. A paper purporting to be a bill of lading, not signed by the captain or clerk of the boat, or any one authorized to sign the same, is not admissible in evidence in a suit for the recovery of damages from the insurance company where loss has occurred by the destruction of the steamer. In such a case the document was inadmissible until proved by competent testimony.
Pendery & Naylor v. Crescent Mu. Ins. Co., 410.
15. The evidence of the captain of the vessel as to the contents of a manifest, and the copy of the manifest are inadmissible until the loss of the original manifest is shown by evidence *Ib.*
16. Testimony taken by commission in another State of the Union is inadmissible in the courts of this State unless the record of the testimony shows the authority of the commissioner who executed the commission. *Ib.*
17. The allegation and testimony of a purchaser of goods of an overcharge by the vendor is not entitled to much weight when made for the first time after suit is brought, nor is the testimony of the purchaser admissible to show that other merchants would have made a larger discount than that allowed by the seller.
Morris, Tasker & Co. v. Fleming, 411.
18. In a controversy about the title to real estate which is attacked on the ground of simulation, any title, on its face translativ of the property, is admissible as rebutting testimony against the charge.
Simmons v. Norwood, Sheriff, 421, and
Marcelin v. His Creditors, 424.
19. In an opposition to the account filed by the syndic of an insolvent, the record of a suit between the syndic and a third party is not admissible to prove that the opponent is not the owner of the notes on which the opposition is founded; nor is the brief of council for the insolvent, in other proceedings, admissible on the trial of the opposition of the account of the syndic. *Marcelin v. His Creditors* 423.

EVIDENCE—Continued.

20. A white man is allowed, by the laws of Louisiana, to acknowledge his natural children by a woman of color. Such acknowledgment must, however, be made before a notary public, in the presence of two witnesses. None but authentic evidence of the acknowledgment is admissible to establish the fact.
Casanave, Adm., v. Ringaman, 435.
21. The affidavit of a party, received without objection, showing that a letter book has been lost, which contains the correspondence between the defendants and their agent or depositary, is sufficient to authorize the introduction of secondary evidence to prove their contents.
Yule & . v. Oliver & Drake, 454.
22. In a suit by the creditors against the executor to remove him from office, evidence offered by the executor, impugning the motives of the attorneys who bring the suit, is irrelevant to the matters at issue, and is not admissible.
Rogers v. Morrison, Ex., 455.
23. The denial, under oath, of a signature to a promissory note, can only be overcome by one of the three kinds of proof required by article 325 of the Code of Practice.
Succession of Leonard, 523.
24. A receipt given for money received is not conclusive between the parties, and may be contradicted or explained by parol testimony.
Porter v. Brown and Chaler, 532.
25. Parol evidence is not admissible to establish an agency to sell land.
Mumford v. McKinney, 547.
26. Evidence to establish title is not admissible in a possessory action.
Lott v. Mills and Sheriff, 559.
27. A receipt given for money paid is not conclusive between the parties, and may be contradicted or explained by evidence, but when the evidence offered is contradictory, and that offered on one side entitled to as much weight as the other, the receipt will stand.
Borden v. Hope, 581.
28. A copy of a deed of trust and the assignment thereof, which is kept in a public office of any State, not appertaining to a court, is admissible in evidence in the courts of this State, on being properly attested by the keeper of such records, without showing the loss of the original. Act of Congress of March 27, 1804.
Graham & Anderson v. Williams, 594.
29. By a statute of Mississippi, approved March 13, 1837, copies taken from the record of all instruments in writing may be received in evidence, and when so received they have the same effect as though the original were produced.
Id.
30. When a statute of another State has once been recognized as law in that State, by a decision of the courts of this State, the courts of Louisiana will thereafter take judicial cognizance of the statute, and until it be proved that the law has been changed, will presume it still exists.
Id.

EVIDENCE—Continued.

81. A depositary cannot be permitted to introduce evidence to impeach the title of the depositor. *Ib.*
82. The burden of showing the incapacity of a judge to act as such falls on the party who alleges such incapacity.
Simon v. Haifleigh, Sheriff, 607.
83. Negotiable notes, which are identified with the notarial act of mortgage given to secure their payment, make full proof of themselves. *Ib.*
84. The ambiguity in the testimony of a witness will be so construed as to harmonize with the view taken of it by the court *a qua*.
Campbell, Adm'r v. Thibodeaux, 628.
85. In a suit to revive a judgment it is incumbent on the party claiming to be owner to establish the existence of the judgment and his ownership thereof. A copy certified from the mortgage office, without showing the loss of the original, is not sufficient to establish the existence of the original judgment. *Drogre v. Moreau, 639.*
86. A possessor of property under an authentic act is not bound to establish the verity of the sale where it is attached by a creditor on the ground of simulation. *Sellers v. Sellers, 647.*
87. The burden of showing simulation falls on the party attaching, when the purchaser is in possession. *Ib.*
88. The holder of a promissory note cannot be permitted to prove by interrogatories propounded to the husband, in a suit against the wife, that the note sued on was signed by him as her agent.
Robichaux v. Bouillet, 681.
89. Parol evidence is inadmissible to prove a service of citation or copy of petition. *Gliddon v. Goos, 682.*
40. Evidence is not admissible to establish facts set up in an exception filed after issue has been joined by the filing of an answer.
Case, Receiver, v. Watson and Dunham, 731.
41. In a suit to enforce a written notarial contract of sale, the certificate of marriage is admissible to show that the vendor is a married woman, and where the notarial act is alleged to have been procured by fraudulent and deceptive practices, its declarations may be contradicted by parol testimony. *Willis v. Kern, 749.*
42. The husband cannot be a witness for or against his wife in a litigation to which she is a party. Acts of 1867, p. 269. *Ib.*
43. The dying declarations of a party who acted as interpreter for the vendor at the passage of a notarial act of sale, are not admissible in evidence on a trial of a suit to enforce the contract. *Ib.*

SEE AGENCY AND AGENCY—*McCarty v. Straus, 592.*

SEE CONTRACTS—*Bethel v. Hawkins, 620.*

EXECUTORS AND ADMINISTRATORS.

1. An executor or administrator is an officer of the court, and the funds coming into his hands as such are amply secured by the bonds he is required to give before entering upon the duties of his office.

State ex rel. Gausson, Executrix, v. Judge Second Dist. Court, 43.

2. An executor or administrator cannot bind the estate he represents by making or indorsing a promissory note in that capacity, but he will be held personally responsible for the amount, and the holder is not bound to allege or prove that the executor exceeded his powers in order to hold him personally responsible on the note.

Livingston v. Gausson, Adm'x, 286.

3. In homologating a tableau of distribution the judge can only order the executor to distribute the funds in his hands. He cannot order him to pay a particular fund to a creditor which he has previously ordered to be paid to another. *Succession of Johnson, 297.*

4. The executor cannot be punished for contempt, in not paying a particular fund, when he has paid that fund to another creditor under the order of the court. *Ib.*

5. The administrator or executor is without the power to renounce or waive prescription after it has been acquired in favor of the estate he represents. *Sevier v. Succession of Gordon, 373.*

6. Where the evidence shows that the testamentary executor has been recreant to his trust, and has administered the estate with a total disregard of the interests of the creditors and heirs, he will be removed from office, and a dative testamentary executor will be appointed according to law. *Rogers v. Morrison, Ex., 455.*

7. An administrator cannot be permitted to resist an application for an order to sell the property of the succession founded on a judgment against the estate, by setting up unliquidated claims in re-convention against the judgment creditor.

Brown v. Roberts, Admr., 508.

8. An executor is not permitted to make any charges against the estate he administers for services rendered, other than the two and a half per cent. commissions allowed him by law on the amount of the inventory. *Succession of Sprowl, 544.*

9. An executor, having received the funds of the estate he administers, and afterward disposed of them for notes of the so-called Confederate States will be held liable to the heirs for the amount thus received. *Ib.*

10. To maintain an action by a creditor to remove an executrix from office, the party must allege that he is a creditor of the succession. The allegation that he is a creditor of the executrix or the heirs is not sufficient. C. P. 1018.

Carroll, Hoy & Co. v. Huie, Executrix, 561.

EXECUTORS AND ADMINISTRATORS—*Continued.*

11. A power of attorney given by a legatee, residing in another State, to collect a legacy, under a testament made in this State, creates a sufficient interest in said agent in the estate of the testator to entitle him to the appointment of dative testamentary executor. A dative executor will be appointed where it is shown that the executors named in the will have failed to qualify and the interest of the legatees require a representative. *Succession of Rice*, 614.
12. The first applicant among creditors is entitled to the appointment of administrator, without reference to the amount or dignity of their claims against the estate. *Succession of Beraud*, 666.

SEE BILLS AND PROMISSORY NOTES—*Livingston v. Gausson*, 286.

EXECUTORY PROCESS.

1. The only question to be inquired into on appeal from an order of seizure and sale, is whether there was sufficient evidence before the judge *a quo* to authorize the fiat. *Citizens' Bank v. Dixey*, 32.
2. An order of seizure and sale cannot be set aside on appeal, on account of subsequent irregularities in the execution thereof. *Ib.*
3. The only question presented on an appeal by a third party from an order of seizure and sale is, had the judge who granted the order sufficient evidence before him to authorize the issuing of the writ. A third party appealing from an order of seizure and sale, may avail himself of all that is in the record that affects his rights; but the validity of the mortgage on which the order of seizure is based, cannot be inquired into on such appeal. *Lapin v. Lapin*, 52.
4. When a want of identity of the note, with the act of mortgage by which it is secured, is shown to exist, the holder cannot proceed by executory process to seize and sell the property mortgaged. *Taylor v. Boedicker & Badenhausen and Moody*, 170.
5. The holder of promissory notes secured by mortgage on real estate importing a confession of judgment, may proceed *in rem*, after the mortgagee has died, to foreclose the mortgage without provoking the appointment of an administrator to represent the succession. *Randolph v. Chapman*, 486.
6. Where the act of mortgage imports a confession of judgment, and no partition of the estate has been made among the heirs, the mortgage creditor may seize and sell the hypothecated property, as if the original debtor were still alive. *Ib.*
6. If the widow and heirs of the deceased husband, whose property is specially mortgaged, be non-residents, the mortgage creditor, in a suit against the mortgaged property, may provoke the appointment of curator *ad hoc* to represent them. *Ib.*

EXECUTORY PROCESS—Continued.

8. In an appeal from an order of seizure and sale, the Supreme Court will limit their examination to the validity of the order.
Taylor v. Hill, 626.
9. An order of seizure and sale granted on notes that were prescribed at the date of the order, will be set aside on appeal. *Ib.*
10. The wife is sufficiently authorized, if, in a proceeding by executory process to sell her mortgaged property, both she and her husband are made parties defendant. *Monition of Hall*, 692.
11. The averment in the petition that the defendants are non-residents, is sufficient to authorize the appointment of an attorney to represent them in a proceeding *via executiva*. *Ib.*
12. The court will notice judicially who are its attorneys, and where it appears that an attorney has been appointed curator *ad hoc*, the phrase curator *ad hoc* will be treated as surplusage, and the appointment be regarded as that of attorney to represent the absentee. *Ib.*
13. The attorney appointed to represent the absentee in a proceeding *via executiva*, is the proper party to whom service must be addressed and on whom service must be made. *Ib.*
14. The readvertisement of property that has been once offered for sale, is sufficient notice to all parties interested. *Ib.*
15. The law does not require the sheriff to return an order of seizure and sale in seventy days, retaining a copy where it has not been fully executed, the same as in case of a *fi. fa.* The direction by the clerk to return the order in seventy days has no legal effect. *Ib.*

FRAUD.

1. When the seizing creditor of the husband is confronted by the wife's claim to the property seized, founded on a judgment of separation of property, and the authentic act of sale and purchase of the property seized, from a third party to the wife, made after the judgment of separation and prior to the date of seizure, the creditor, to maintain the seizure, must allege and show fraud and simulation in obtaining the judgment of separation.

Myers v. Sheriff, 172.

- 2 The specifying of some of the ways by which a party has been imposed upon and deceived does not preclude the petitioner from giving evidence of other acts of deception under the general allegation of fraud.

Miller v. Bedell, 573.SEE DONATION—*Chase v. McCoy*, 196.**GARNISHMENT.**

1. The service of garnishment process fixes the rights of the seizing creditor from the moment the garnishee makes answer to the interrogatories. *Marchand v. Bell and New Orleans*, 23.
2. The seizing creditor acquires a privilege on the assets in the hands of the garnishee to date from the service of the interrogatories. *Ib.*

GARNISHMENT—Continued.

3. The city of New Orleans was indebted to Robert B. Bell in the sum of \$5000; James McKenzie had judgment against R. B. Bell, on which he caused a garnishment process to issue against the city; the answers of the city to the interrogatories disclosed its indebtedness to Bell. A. Marchand brought suit against Bell and made the city a party, which was not served on the city until after service of the interrogatories in garnishment. Held—That Marchand, the plaintiff, was only entitled to recover the balance due by the city to Bell after paying the amount of McKenzie's judgment. *Ib.*
- 4 A writ of *fieri facias* is the basis of proceedings in garnishment in execution of judgment. The service of interrogatories on the garnishee will not operate a seizure of the assets in his hands, unless the sheriff holds at the time a writ of *fieri facias* against the defendant. *Matta v. Thomas*, 37.
5. Where A garnished on execution against B, a claim for which B is suing C, notice to B of the seizure is not necessary. The law only requires that notice of the seizure should have been given to C. *De St. Romes v. Levee Steam Cotton Press*, 291.
6. A garnishee must stand aloof from the litigating parties, and not lead himself to the advantage of either party. *Citizens' Bank v. Payne & Gilman*, 380.
7. The garnishment process cannot be used as a substitute for a direct revocatory action, nor will the strict rules relative to the answers of garnishees be applied to answers to interrogatories whose only tendency is to assail titles to property. *Battles v. Simmons*, 416.

HOMESTEAD.

1. Under the homestead law, the surviving widow and children of the deceased husband have a superior mortgage and privilege on the proceeds of the sale of the property of the husband to the extent of one thousand dollars over all other creditors, except the vendor's privilege and the expenses of the sale. She may assert this privilege in a suit between the other mortgage creditors and the purchaser of the property before the court that granted the order of seizure and sale. *Quertier v. Succession of Hille*, 429.
2. The claim of the widow and heirs of one thousand dollars, allowed by the statute of 1852, out of the succession of the husband and father, cannot be taken from the funds of a partnership of which the deceased husband was a member, while the partnership debts are unpaid, and before a division of the assets are made between the partners. *Succession of Stauffer*, 520.

HUSBAND AND WIFE.

1. When the seizing creditor of the husband is confronted by the wife's claim to the property seized, founded on a judgment of separation of property, and the authentic act of sale and purchase

HUSBAND AND WIFE—Continued.

of the property seized, from a third party to the wife, made after the judgment of separation and prior to the date of seizure, the creditor, to maintain the seizure, must allege and show fraud and simulation in obtaining the judgment of separation.

Myers v. Sheriff, 172.

2. The signature of the husband to a note and mortgage to secure its payment, executed by the wife, is a sufficient authorization by the husband for the indorsement of the note by the wife.

City National Bank v. Barrow and Husband, 396.

3. On the trial of an injunction suit by the wife against the seizing creditor of her husband, a brother of the husband, a witness, was asked by the defendant on cross-examination the following question: "What did your brother say to you in relation to the sale from him to Mrs. Bracy (the donor) after it had been passed? Held—that the answer was properly excluded, on the ground that the husband could not make a disclosure against the interest of his wife.

Simmons v. Norwood, Sheriff, 421.

4. A notarial transfer by the husband to the wife, of property, in payment of her judgment against him, cannot be canceled and annulled by a subsequent agreement between them. *Warfield v. Bobo*, 466.
5. Contracts between the husband and wife are forbidden, except in the cases especially enumerated in article 2421 of the Civil Code. *Ib.*
6. Where the transfer of real estate is absolutely null and void, the creditor may proceed against the property as though it had not been interposed. *Ib.*
7. After a separation of property, the wife is not bound for the debts of the husband which were contracted before the separation, unless it is shown that the debt enured to her separate benefit or that of her separate property. *St. Louis University v. Prudhomme*, 525.
8. A debt for the support and education of the common offspring, contracted by the husband while he has the control and administration of the dotal property of the wife, can not be enforced against the wife after she has resumed the administration of her separate estate by authority of a judgment of separation of property. *Ib.*
9. The allegation of a married woman in her petition that she is "joined and authorized" by her husband, is not sufficient authority to enable her to prosecute the suit. *Succession of Pomeroy*, 576.
10. A married woman can only appear in court with her husband appearing also, or by showing his authorization otherwise than in her own averments.
11. The rule laid down in article 2269 of the Civil Code, that the husband can not be a witness for or against his wife, etc., is wit.

HUSBAND AND WIFE—Continued.

out exception, and is applicable to all cases in which either of them are directly concerned, without reference to the time that such relation commenced. *Leon v. Bouillet*, 651.

SEE COMMUNITY.

" **EVIDENCE**—*Wells v. Kern*, 749.

" **MORTGAGE**—*Pecot v. Brothers*, 667.

INJUNCTION.

1. A District Court is competent to issue an injunction against a seizure made by the sheriff under a *fi. fa.* order of sale issued from another parish of the State, and to try the issue raised by the injunction. 5 An. 641; 16 An. 110. *Arenstein v. Weber, Sheriff*, 199.

2. The question of simulation does not arise in a suit by injunction between the seizing creditor and a third opponent who claims the property, unless the seizing creditor shows that he owns or has sold it. *Ib.*

3. Where it is manifest from the record that the plaintiffs in injunction would be entitled to a new writ if the one which had issued were dissolved, the case will be remanded to enable the plaintiffs to supply the evidence omitted.

Citizens' Bank v. Crooks & Maristany, 324.

4. An injunction cannot issue to stay execution on grounds which might have been pleaded in defense before judgment.

Greene v. Johnson, Sheriff, 464.

5. A writ of injunction issued by the clerk of the District Court before the adoption of the Constitution of 1868, did not become void on the adoption of the Constitution. Article 150 of the Constitution continued the laws in force in relation to the duties of officers until the organization of the government under the Constitution, although contrary to it. *Williams v. Douglass, Sheriff*, 468.

6. An agent of an absentee holding a general power of attorney is competent to make the necessary oath to obtain a writ of injunction on behalf of his principal. *Ib.*

7. The motion to dissolve the injunction on the ground that the allegations in the petition are not true, must be referred to the merits. *Ib.*

8. A party applying for an injunction need not allege technically that "he will be injured."

9. An injunction will not lie to restrain the execution of a final judgment on the ground that the amount is erroneous.

Stinson v. PHH, Sheriff, 460.

SEE ACTION—*Richard v. Beauchamp*, 635.

INTERROGATORIES.

1. Interrogatories that have not been answered on or before the trial will be taken as confessed, where there is no order of court requiring the defendant to answer in open court.

Blanchin & Giraud v. Pickett, 680.

2. An administrator is bound to answer interrogatories propounded to him in a suit against the estate he represents. *Ib.*
3. Personal service of interrogatories on the party interrogated is not required. C. P., 187. *Ib.*

INTERVENOR.

1. An intervenor in an attachment suit will not be permitted to urge defenses personal to the defendant. The admissibility of testimony, the formality and regularity of the pleadings are matters pertaining exclusively to the defendant. His position in the case is limited to showing that he is the veritable owner of the property attached, or that he has a lien upon it superior to that of the attaching creditor.

Fleming & Baldwin v. Shields, 118.

2. An intervenor cannot be heard by exception to the form of action by the plaintiff. *Heirs of Bedell v. Hayes*, 643.
3. A creditor intervening in a suit by the heirs against their mother, to enforce payment of their interests in their father's estate which she has purchased, by opposing the validity of the claims of the heirs is not instituting an inquiry into the correctness of the judgment approving the adjudication. *Ib.*

4. An intervenor must establish the correctness of his own claim before he can oppose prescription to the plaintiff's demand.

Walker v. Simon, 669.

INSOLVENCY AND INSOLVENT PROCEEDINGS.

SEE BANKRUPTCY.

JUDGMENT.

1. A judgment rendered against a party who has neither been cited nor made an appearance by answer, is an absolute nullity.

Leblanc & Co. v. Perroux, 26.

2. Citation served on a person not a party to the suit, whom it is neither alleged nor shown was the agent of the principal, is defective, and judgment rendered thereon is null and void. *Ib.*

3. A judgment of the District Court not regular in form will be annulled on appeal, and such judgment as should have been rendered by the judge *a quo* will be pronounced by the Supreme Court.

Chapman v. N. O., Jackson and G. N. Railroad Co., 224.

4. The Judge of the District Court gave as reasons for judgment, "after hearing the evidence and argument of counsel, and considering the law and the testimony adduced, and the reasons orally assigned, it is ordered," etc. Held to be a sufficient compliance with article 80 of the constitution, *Fitzgerald v. Lapice*, 226.

JUDGMENT—*Continued.*

5. The citation required by the act of 1853, p. 250, in that the judgment may be revived before it is prescribed, refers to the judgment rendered by the District Court, and not that of the Supreme Court.
Arrowsmith v. Durell, 295.
6. The signing of a final judgment by the judge is a judicial act, which can only be performed in term time.
Simonds & Co. v. Leory, 306.
7. The signature of the judge placed to a final judgment, out of term time, will have no effect.
Ib.
8. Execution cannot legally issue on a judgment rendered on default until after notice of judgment has been served on the defendant.
Greene v. Johnson, Sheriff, 464.
9. A judgment rendered by a judge of one of the courts of the State deriving his title and office from the State authorities, while the State was in insurrection, is legalized by article 149 of the State Constitution, adopted in 1868.
Hughes v. Stinson, 540.
10. The judgment referred to in article 575 of the Code of Practice means a judgment that can be executed under a writ of *fieri facias*.
State, ex rel. Board Metropolitan Police, v. Judge Sixth District Court, 741.
11. A judgment making a writ of mandamus peremptory, directing a public officer to pay an amount of money in his hands, is not such a judgment as may be executed under a writ of *fi. fa.* From such a judgment, the judge *a quo* should grant a suspensive appeal, and fix the amount of the bond, without reference to the amount of the judgment making the writ peremptory.
Ib.

JUDICIAL SALE.

1. A purchased at probate sale a lot of untanned hides then in the tan vats which were on the plantation, together with a lot of tan bark and the tools necessary to finish tanning out the leather. B purchased the plantation at the probate sale, on which the tan yard is situated, who brings this suit against A for the use of the tan yard, etc. Held—that inasmuch as no contract or agreement between A and B is shown about the use of the tan yard, and the *proces verbal* of the sale shows that A purchased the leather then in the tan, together with the tools and bark, he is entitled to the use of the tan yard free of costs for tanning out the leather.
Palmer v. Petty, 176.
2. At a probate sale of real estate belonging in part to minor heirs by and with the advice and authorization of a family meeting, approved by the under tutor, the purchaser is bound to pay the price bid. The omission to make the major heirs parties to the proceedings for the order of sale is cured by their failing to make objection before the sale.
Misner v. Heirs of Fulshire, 282.
3. A judgment creditor cannot sell under execution the buildings, seed cane, and mules, placed on a sugar plantation separately from the plantation.
Citizens' Bank v. Crooks & Maristany, 324.

JUDICIAL SALE—Continued.

4. Where real estate has been specially mortgaged, or the vendors' privilege has been duly recorded to secure the payment of the price, and the purchaser dies and his succession is opened in the probate court, an order of seizure and sale may issue from a court of ordinary jurisdiction against the succession, to enforce the mortgage rights, and the property mortgaged be seized and sold, and the same tribunal that authorizes the sale has jurisdiction over the proceeds thereof, and those entitled to them may claim them in such court, where their rights must be established.

Quertier & Co. v. Succession of Hille, 429.

5. A purchaser of property under an order of seizure, who claims the fruits of the sale, is precluded from questioning the validity of the decree ordering the immovables by destination to be sold with the mortgaged property.

Hon v. Whited & Gibbs, 495.

6. A party cannot claim the nullity of a judicial sale and the fruits of the sale in one and the same action.

Tarleton, Whiting & Tullis v. Kennedy, 500.

7. Where a court has jurisdiction its decree will protect the purchaser at probate sale from all informalities which may have preceded it, in the absence of any charge or proof of fraud.

Woods v. Lee, 505.

8. The indorsement on the back of an order of sale by the administrator who makes the sale is admissible in evidence on the trial of a suit to annul the sale. The objection that its genuineness is not proved goes to the effect.

Ib.

9. Five years possession of property purchased at probate sale will protect the purchaser against all irregularities and informalities which have been committed by the administrator after the date of the order of sale.

Ib.

10. A judicial sale made in conformity with the laws of the State, after the twenty-sixth of January, 1861, is legalized by article 149 of the Constitution adopted in 1868.

Hughes v. Stinson, 540.

11. A third party who makes opposition to a motion sued out by the purchaser at judicial sale, must, in order to maintain his opposition, show an injury resulting to himself from the sale.

Gilmer, Application for Monition, 589.

12. A party having purchased property at probate sale during the war, cannot set up in defense to the payment of his obligations that the sale was made on the basis of the value of Confederate notes at the time of sale, and obtain a reduction of the price bid to that extent.

Bordelon v. Coco, 671.

JURIES AND JURORS.

1. Questions of fraud and the credibility of witnesses are peculiarly within the province of the jury, and their verdict will not be disturbed, unless it is manifestly erroneous.

Brown v. Sadler, 182.

JURIES AND JURORS—Continued.

2. The verdict of the jury, unsupported by the evidence in the record, will be set aside on appeal, and the judgment rendered thereon will be annulled and the suit dismissed. *Cardaillac v. Duthe*, 219.
3. The qualifications of jurors to serve on the grand and petit juries in the courts of the State are, that they must be qualified electors of Louisiana. Acts of 1868, No. 110. *State v. Parks*, 251.
4. Where one of the panel of the grand jury is disqualified, any indictment found by them is null and void, and the accused may raise the objection and show the fact after verdict. *Ib.*
5. Where all the facts are spread upon the record, the Supreme Court will not take into consideration the charge of the judge *a quo* to the jury. 6 Martin, 498.
Moloney Brothers & Co. v. Rugely, Blair & Co., 330.
6. Where the verdict of the jury contradicts the admission of the defendants in the answer, and the ends of justice require it, the case will be remanded.
Bancker & Co. v. Marti and Walters & Elder, 587.
7. All objections to the informalities which may have occurred, in the formation, drawing or summoning of the grand jury, must be made on the first day of the term of the court, and not afterwards.
State v. Hoffpauer, 609.
8. Where the venire from which the grand jury is drawn is composed of legally qualified jurymen, it will not be set aside on objections made after the first day of the term. *Ib.*

SEE CRIMINAL LAW AND CRIMINAL PROCEEDINGS—*State v. Evans*, 821.

JURISDICTION.

1. When the record shows that a twelve months' bond has been given for the price of slaves sold under execution, payment thereof can not be legally enforced, nor will the purchaser be permitted to recover back any portion of the price he may have paid.
Thomas v. Hackett, 164.
2. The District Court that rendered the judgment, alone has jurisdiction of the action to annul it. C. P. 608; 2 A. 493.
Butman v. Forshey, 165.
3. The Adams' Express Company, domiciliated in the State of New York, and all of its corporators, citizens of other States than Louisiana, has a right, when sued in one of the courts of this State, by a citizen of the State, to remove the cause to the next Circuit Court of the United States. Judiciary Act of 1789, Section 12.
Rosenfield v. Adams' Express Co., 233.
1. All proceedings taken in a cause by a State court after erroneously denying an application to remove to the Circuit Court of the United States, are *coram non jndice* and void. *Ib.*

JURISDICTION—Continued.

5. Failure to except to the jurisdiction will not render valid a judgment by a court without jurisdiction *ratione materiae*.

Duncan v. Holt & Co., 235.

6. A party, in whose favor judgment has been rendered by a court having no jurisdiction, need not be made a party to the appeal.

Ib.

7. The act of the Legislature of 1853, page 190, and the subsequent acts of 1855 and 1865, making the Second District Court of New Orleans exclusively a probate court, and requiring all successions to be opened therein, does not divest the other District Courts of New Orleans of jurisdiction in succession cases pending in these courts at the date of the passage of the law. In such cases the jurisdiction of the court where the succession was opened is complete and exclusive until the final termination of all disputes involved in the settlement of the succession.

Chapman v. Bakewell, 353.

8. A judgment rendered by the Second District Court for the parish of Orleans, in a controversy wherein the Fifth District Court for the parish of Orleans has exclusive jurisdiction, is null and void, and the nullity will be so declared on appeal.

Ib.

9. The statute of 1856, p. 117, sec 1, amending the act of 1855, providing for the trial of contested elections in the parish of Orleans, gives to any one of, and to all six District Courts then in existence, jurisdiction over all suits for the contest of the elections of all officers elected for and in the parish of Orleans, with the right of appeal to the Supreme Court as in other cases.

Staer v. Gastinel, 407.

10. The office of Recorder of the Second District of the parish of Orleans is an office of the parish, and the election may be contested before the Sixth District Court of the parish of Orleans.

Ib.

11. Where real estate has been specially mortgaged or the vendor's privilege has been duly recorded to secure the payment of the price, and the purchaser dies and his succession is opened in the Probate Court, an order of seizure and sale may issue from a court of ordinary jurisdiction against the succession, to enforce the mortgage rights, and the property mortgaged be seized and sold, and the same tribunal that authorizes the sale has jurisdiction over the proceeds thereof, and those entitled to them may claim them in such court, where their rights must be established.

Quertier & Co. v. Succession of Hille, 429.

12. Under the act of March 29, 1865, the Fourth District Court of New Orleans was without jurisdiction to issue an injunction against the execution of a judgment of a justice of the peace, the Third District Court of New Orleans having exclusive jurisdiction over such cases by this act.

Mora v. Kuzac, 751.

JURISDICTION—Continued.

13. The institution of a suit in a court that has no jurisdiction is null, and the subsequent investiture of jurisdiction will not cure the nullity. *Ib.*

SEE ACTON—*Gosselin v. Womack*, 193.

" **ACTION—***Juillard v. Rogay*, 259.

" **ABSENTEE—***Succession of De Roffignac*, 364.

" **BILLS AND PROMISSORY NOTES—***Lytle v. Whicher*, 182.

" " " " " *—Campbell v. Waters*, 325.

" " " " " *—Groves v. Clark*, 567.

" " " " " *—Coco v. Calliham*, 624.

" " " " " *Heidenreich v. Leonard*, 628.

" " " " " *—Levy v. Gremillion*, 635.

" " " " " *—Estin v. Ducerst*, 555.

" " " " " *—Nunez v. Winston*, 666.

" **COMMUNITY—***Heirs of Bedell v. Hayes*, 643.

" **CONFEDERATE TREASURY NOTES.**

" **CONFEDERATE OBLIGATIONS.**

" **PARISH COURTS.**

" **SALE—***Hayden v. Phillips and Foster*.

" **SOVEREIGN POWER—***Dranguet v. Rost*, 593.

JURISDICTION, APPELLATE.

1. Where the amount involved does not exceed five hundred dollars, the appeal will be dismissed. *Rooney v. Brown*, 51.

2. In a proceeding by mandamus to recover possession of the books, keys, etc., in which the office of sheriff is kept, the party against whom the writ is directed must show an interest in the possession of such property exceeding five hundred dollars to entitle him to a suspensive appeal from the judgment ordering him to deliver possession to the claimant.

State ex rel. Craigh v. Judge Seventh Judicial District, 107.

3. To give the Supreme Court jurisdiction of the appeal the amount in dispute must exceed \$500. *Succession of Espinola*, 264.

4. A general allegation of opposition to all the items on the debt side of the account, without proof to sustain it, will not give the Supreme Court jurisdiction. The amount over which there is a contest only can be taken into consideration in determining the question of jurisdiction, and if not above five hundred dollars, the appeal will be dismissed. *Ib.*

5. It is the amount in dispute in the District Court that gives the Supreme Court jurisdiction of the appeal.

Maxen & Shearer v. Landrum, 366.

6. The act of the Legislature of March 17, 1859, incorporating the city of Carrollton, authorizes suit to be brought by the Mayor and Councilmen for and on behalf of the city, the affidavit of the Mayor that the interest of the city is above five hundred dollars is sufficient to give the Supreme Court jurisdiction of the appeal.

Carrollton v. Board of Metropolitan Police, 447.

JURISDICTION, APPELLATE—Continued.

7. An order issued by the Parish Judge, directing the clerk of the District Court to transfer to the Parish Court the record of a suit, is in the nature of a proceeding by mandamus, and no appeal will lie from such an order without showing an adverse interest above five hundred dollars. The Supreme Court will notice, of their own motion, their want of jurisdiction. *Swan v. Bry*, 481.
8. The Supreme Court has appellate jurisdiction only, and cannot try questions of fact until they have been passed upon by the court below. *Succession of King*, 502.
9. Questions of fact not raised on trial in the District Court cannot be examined on appeal. *Elton v. Temple*, 502.
10. The Supreme Court has appellate jurisdiction only, and any fact not presented in the court below will not be noticed on appeal. *Succession of Tauzin*, 536.
11. A writ of mandamus will not issue to compel the District Judge to grant a suspensive appeal when it is shown that the amount in contest is not sufficient to give the Supreme Court jurisdiction of the appeal. *State ex rel. Western Union Tel. v. Judge Seventh Dist. Court*, 728.
12. The amount necessary to the jurisdiction of the appellate court is the sum in controversy at the time of judgment. *Ib.*

LANDLORD AND TENANT.

1. Where a party has leased, for a given time, certain described premises, including several houses and lots of ground in the city of New Orleans, and a fire breaks out which destroys the buildings on a portion of the leased premises, the lessee has the option under art. 2667 of the C. C., to demand a revocation of the entire lease, or a diminution *pro tanto* of the rate. He cannot retain the portion of the leased property unaffected by the fire and have the lease revoked as to that which was destroyed. *Penn v. Kearny, Blois & Co.*, 21.
2. Where the evidence shows that a commercial firm have enjoyed the benefits of a lease that has been made to and in the name of one of the members of the firm, they will be held liable *in solido* for the rent of the property leased. *Ib.*
3. Evidence to show that the firm name was marked on goods deposited in the warehouse is inadmissible in a suit by the lessor to recover the rent. *Ib.*
4. Where a sale of a lease owned by a succession, has been judicially declared to be null, the property in the lease reverts to the estate. *Keller v. Blanchard*, 38.
5. The lessee can not make repairs on the premises leased at the expense of the lessor, without first putting him in default. *Favrot v. Mettler*, 220.

LANDLORD AND TENANT—Continued.

6. A, in his capacity of lessor, brought suit against B, his lessee, for rent; A afterwards brought suit against B to annul the lease and restore the leased premises. B excepted to the latter suit on the ground that the same cause of action was pending in the other suit. Soon after filing this exception of *lis pendens* to the suit to annul the lease, B filed an answer to the suit for rent, setting up a conventional demand in damages, with a prayer that he be quieted in the possession of the premises leased, and argued on the trial of the exception of *lis pendens* that the issue created by the answer was the same as the demand for possession in the suit to annul the lease. Held—That B could not urge the pendency of a contestation thus created by himself against a prior demand of A.

Morgan v. Tamiet, 266.

7. If a lessee of a market stall or stand dies, the property in the good will of the stand falls into his succession.

Succession of Journe, 391.

8. A contract of lease, without a lawful cause, cannot be made the basis of a demand for rent.

Brown v. Roberts, 508.

9. A lessor has a privilege for the payment of the rent on all the movables found on the leased premises, without reference to whether such property belongs jointly to the partners in the planting business, or to one of them only.

Hynson v. Cordukes, 583.

10. Evidence is inadmissible in a suit by the lessor for rent, to show the terms and conditions of a partnership between the lessees. *Id.*

11. Where a lease has been given for one year, with a privilege of renewal for five years; and a third party binds himself as surety for the lease, and the lease is renewed at the expiration of the year, the surety is not bound on the extended lease, unless it is shown that he consented to the extension.

Fasnacht v. Winkleman, 727.

12. In a suit on a contract of lease, the lessor may show occupancy of the premises, and recover rent for the time, although he fails to establish the contract.

Silverstein v. Stern, 743.

LAWS.

1. Where the law is changed after prescription begins to run, the time elapsed before the change is to be computed according to the old law and that which follows according to the new.

Fisk v. Bergerot, 111.

2. By the statute law of Mississippi all obligations, or notes, or drafts for money, whether payable to order or not, are assignable by simple indorsement. Revised Code of Mississippi, p. 355.

Marx v. Wheelis, 140.

LANDLORD AND TENANT—Continued.

3. The law of 1856, section 131, page 136, exempting the city of New Orleans from giving bond in litigations to which she is a party does not apply to the Treasurer or other officers of the city. The statute exempting the corporation from giving bond is an exceptional one, and cannot be extended to other parties than those mentioned.

State ex rel. George v. Mount, City Treasurer, 177.

4. Where a law is clear and free from all ambiguity, the letter of it must not be disregarded under the pretense of pursuing its spirit. C. C. 13. *Arrowsmith v. Durell, 295.*

5. The title of the act of the Legislature of 1868, No. 27, entitled an act "to determine the mode of filling vacancies in all offices for which provision is not made in the constitution" is sufficiently comprehensive to embrace the objects of the statute.

State ex rel. Belden, Att. Gen., v. Leovy, 538.

6. Section one of this act does not violate the constitution in requiring vacancies in municipal offices to be filled by appointment. *Id*

7. The statute of 1865, exempting certain property from seizure under execution, is in derogation of common right, and the exemption from seizure will not be extended to objects not expressly designated in the law. *Guillory v. Deville, 686.*

8. The title of the act of the General Assembly, approved eleventh of July, 1868, entitled "An Act relative to the finances of the State," is sufficiently explicit to embrace the objects of the statute. The title of a law is not to be strictly construed; neither is the above quoted act retroactive in its effect.

City National Bank v. Mahan, Tax Collector, 751.

SEE CONSTITUTION.

LETTER OF CREDIT.

1. Darby & Tremoulet, commission merchants, in the city of New Orleans, made advances to A. Grevemberg to a large amount, predicated on a letter of credit written by Mrs. Widow Fuselier, his mother, requesting said firm to make advances to and accept the drafts of said Grevemberg to enable him to pay for a plantation. Grevemberg obtained the advances and afterwards shipped his sugar crops to said merchants, which far exceeded in value the amount of advances made to him, the proceeds of which he was allowed to draw out without reserving the amount of the advances. Grevemberg died, and his merchants failed to present and enforce their privileges against his estate. Held—That the failure on the part of said Darby & Tremoulet to enforce payment for their advances, while it was in their power, discharged the surety who was bound on the letter of credit. That under this state of facts, the party giving the letter of credit is discharged by their laches. *Darby & Tremoulet v. Fuselier, 636.*

LIS PENDENS.

1. Where the suit was brought before the United States Provisional Court, but not decided before that tribunal ceased to exist, between parties residing in this State, the plea of *lis pendens* will not prevail in a suit before the State courts on the said obligation and between the same parties on the ground that both parties being residents of the State, the case could not be transferred to the United States Circuit Court. *Noland v. Sterling*, 277.
2. The plea of *lis pendens* will not be maintained where it is shown that a suit by mandamus has been brought in the name of the State on the relation of a claimant for office, and is still pending, and another suit has been brought in the name of the State by the District Attorney joining the same claimant for office as in the mandamus suit under the acts of the Legislature of 1868, number 58 and 156 providing a remedy against usurpation and intrusion into office. In the mandamus suit the State is merely a nominal party, and in the suit brought under these acts of the Legislature the State is the actual party in interest wherein the right to hold office is the principal subject of inquiry. Want of identity of parties, and not having the same objects in view, operates as a bar to the plea. *State v. Kreider*, 482.
3. A holder of mortgage paper having proceeded by executory process to enforce payment, cannot, while the suit is pending, proceed *via ordinaria* against the maker of the notes. In such a case the plea of *lis pendens* will be maintained as to the latter suit.

Taylor v. Hill, 639.

MANDAMUS.

1. The rights of an office cannot be inquired into under a proceeding by mandamus. Only the right to the possession of the books, papers, room, keys, etc., can be made the subject of inquiry under this writ. 4 N. S. 623, 12 An. 719, Acts of 1868, p. 71, 199 and 220.

State ex rel. Sternberg v. Lagarde, 18.

2. Where the facts show that the relator is entitled to a suspensive appeal, the judge may be compelled by a writ of mandamus to grant the appeal.

State ex rel. Adams v. Judge Second District Court, 64.

3. The right to an office cannot be inquired into or tested under existing laws on an application for a writ of mandamus.

State ex rel. Hero v. Pitot, 336.

4. The Controller of the city of New Orleans may be compelled by a writ of mandamus to warrant on the City Treasurer for bills which he has approved. Mandamus is the proper remedy to compel a ministerial officer to perform purely ministerial acts.

State ex rel. Pinac v. Mount, Treas., and Landry, Cont., 352.

5. The Treasurer of the city of New Orleans cannot be compelled by mandamus to pay a warrant not yet drawn by the Controller. *Id.*

MANDAMUS—Continued.

6. A mandamus is the proper remedy to compel the Treasurer of the city of New Orleans to pay a warrant drawn upon him by the Controller, and the writ will properly be made peremptory when the Treasurer in his answer discloses no sufficient reason for his refusal to pay. *State ex rel. Avery v. Mount, Treasurer*, 369.
7. The writ of mandamus will not lie to compel the treasurer of the city of New Orleans to perform any act where it becomes his duty as the fiscal agent of the city to exercise a discretion. *Ib.*
8. In a proceeding by mandamus to compel the treasurer of the city of New Orleans to exchange certain bonds of the city for warrants drawn by the Controller, the court will not, under the prayer for general relief, render judgment ordering the Treasurer to pay the warrants in money. *Ib.*
9. A writ of mandamus will not issue to compel the District Judge to grant a suspensive appeal when it is shown that the amount of the judgment is not sufficient to give the Supreme Court jurisdiction. *State ex rel. Western Union Telegraph Co. v. Judge Seventh District Court*, 728.
10. An appeal will lie from an interlocutory order dissolving an injunction on the ground that the surety on the injunction bond is not good and solvent, and a writ of mandamus will issue to compel the judge to send up the record. *State ex rel. Storrs v. Judge Fourth District Court*, 736.

MARRIAGE CONTRACT.

1. P. B. M. Lapice and others executed their promissory note for \$50,000 in favor of Marie Josephine Lapice for borrowed money. Marie Josephine Lapice afterwards made a marriage contract with Jules DeLongpre, in which, among other stipulations, this note for \$50,000 was specially set apart to her as her dowry, an accurate description thereof being given; they were subsequently married, and the note passed into the hands of the husband. Held—That the stipulation of \$50,000 in the marriage contract was merely descriptive of the note, and not an estimation, and the note, or its value, did not fall into the community under article 2334 of the C. C., and the husband became chargeable with no particular sum on receiving it. *Fitzgerald v. Lapice*, 226.
2. The wife, properly authorized by her husband or the judge, may sue for in her own name and recover the amount of a note settled upon her by the marriage contract as dowry. C. P. 107. The appearance of the husband to authorize the suit concludes him from any demand he might have against the makers of the note. *Ib.*

MARRIED WOMEN.

1. A married woman may bind her separate estate for the debts of her husband by complying with the provisions of the act of the Legislature of 1855, approved March 15, No. 290, entitled "An Act to enable married women to contract debts and bind their paraphernal or dotal property." *Keller v. Ruiz*, 283.

SEE HUSBAND AND WIFE.

METROPOLITAN POLICE.

1. The omission in the Constitution of 1868 of article 133 of the Constitution of 1864, left the whole subject of the corporation of the city of New Orleans and its police regulations under the power and discretion of the Legislature. *Diamond v. Cain*, 309.
2. Act No. 1, approved July 6, 1868, creating a Board of Police Commissioners for the city of New Orleans and giving them full power to remove and appoint the police force, and repealing all other acts and parts of acts in conflict with its provisions, divested the Mayor of the city of New Orleans of all authority to appoint a chief or other policeman. Articles 159 and 42 of the Constitution of 1868 were not violated in the passage of this act. (See acts Nos. 74 and 145 of 1868, and Nos. 60 and 92 of 1869.) *Ib.*
3. The appointment of a chief of police by the Mayor of the city of New Orleans after the passage of act No. 1, approved on the ninth of July, 1868, was without any legal force or effect, and such officer so appointed had, by virtue of his appointment, no interest in the office of chief of police, nor in the office of superintendent of metropolitan police created by act No. 74, approved September 14, 1868. Having no interest in the office, he was not entitled to the writ of *quo warranto* nor injunction. *Ib.*
4. The act of the Legislature of September 14, 1868, creating a metropolitan police district repealed so much of the charter of the city of Carrollton, approved March 17, 1859, as gave to the Mayor of said city the control and administration of the police.
Carrollton v. Board of Metropolitan Police, 417.
5. The act of the Legislature of September 14, 1868, took away all control over the police of the city of Carrollton from the Mayor, and vested the same in the Board of Metropolitan Police, and the Mayor and Council, in their representative capacity, having no right in themselves to administer the police, they cannot question the constitutionality of the act of the Legislature vesting the power of policing the city in the Board of Police. *Ib.*
6. That part of the act of the Legislature of September 14, 1868, creating a metropolitan police district and providing for the government thereof, which divests the Mayor and Council of the city of Carrollton from all control over the police of said city, and vests the same in the Board of Metropolitan Police created by the act, is constitutional and valid. *Ib.*

MORTGAGES.

1. The insertion in the act of mortgage of the pact *de non alienando* does not invest the mortgage creditor with the right to disregard the forms of law in making a forced alienation of the mortgage debtor's property. The non-alienation clause springs from the agreement of the parties, and dispenses with the mortgage creditor from the necessity of resorting to the hypothecary action.
Palma v. Abat & Generes, 11.

MORTGAGES—Continued.

2. The transferee of mortgaged property with the pact *de non alienando* contained therein, may sue to annul a forced sale of the property by the mortgaged creditor, on the ground that the formalities of law have not been observed in making the sale. *Ib.*
3. The objection that the mortgagee or his transferee has the right to require that the property mortgaged shall be sold in separate parcels, comes too late if not made before the sale. This fact in itself furnishes no ground to annul the sale. *Ib.*
4. The tacit mortgage allowed by law in favor of minors, on the property of their tutor, dates from the appointment, and the tacit mortgage allowed by law on the property of the husband in favor of the wife to secure the restitution of her paraphernal property which has come into his hands, dates from the time the property was received. *Mille v. Dupuy, 53.*
5. In a case where the property of the husband is not sufficient to pay the mortgage due his ward, for which he is liable as tutor, and the mortgage in favor of his wife for the restitution of her paraphernal property which he has received, the rank and priority of mortgage must be determined by the date at which they respectively took effect. *Ib.*
6. A recital in an act of mortgage that a previous mortgage had been inscribed against the same property will not operate a legal reinscription of the former mortgage; nor will the recital of the former mortgage in the certificate make the latter a party to the former act, or operate as a further notice than that already given by the first inscription. *Britton & Koontz v. Janney, Sheriff, 204.*
7. The pact *de non alienando* contained in an act of mortgage does not dispense the mortgage from the necessity of inscription in the mortgage office, and reinscription within ten years in order to preserve and give validity to the mortgage rights. *Ib.*
8. The tacit mortgage of the heirs of their deceased mother on the property of their father, for the restitution of the paraphernal property, or funds which he has received, only attaches on the property of the father from and after the date at which he becomes the owner of the property. *Smith v. His Creditors, 241.*
9. The mortgage, resulting from a judgment against the husband and his brother *in solido*, rendered and recorded before the sale of the property from the brother to the husband, will take precedence of the tacit mortgage against the property of the husband in favor of the heirs for the restitution of the paraphernal funds of their mother, deceased. Such preference of mortgage rights may be enforced against the proceeds where the property has been sold. *Ib.*
10. The fact that certain of the Clinton and Port Hudson Railroad bonds were kept in the same safe where the liquidator of the company kept its papers, books and assets, did not operate a payment of the bonds nor an extinction of the mortgage.

Clinton and Port Hudson Railroad Company v. Brown, 248.

MORTGAGES—Continued.

11. Where the sheriff held an execution issued in favor of the company directing the sheriff of the mortgaged property, nothing short of a payment into the sheriff's hands would operate as a payment or satisfy the mortgage. *Ib.*
12. Where there are two separate debts, and to secure the payments of which two separate mortgages are given on the same property, the date of registry of the mortgages will determine the rights of the holders. *Peychaud v. Citizens' Bank, 262.*
13. Where an act of mortgage declares the object mortgaged to be the entire interest in a certain parish named, giving the number of acres, mentioning the river on or near which it lies, and by which it is bounded, with a reference to certain titles of the mortgagor to be found in the office of the Recorder of Mortgages for the parish, the description of the property is sufficient. *City National Bank v. Barrow, 396.*
14. The right to have a mortgage canceled can not be tested before the courts, unless all those having an interest be made parties. *State ex rel. Durrie v. Recorder of Mortgages, 401.*
15. The sale of the property of a bankrupt by the assignee does not operate a release of the mortgages and attach them to the proceeds. *Ib.*
16. The mortgage and vendor's privilege on real estate is not impaired by the sale of the property by a syndic of the insolvent, and the holder of the mortgage and privilege is entitled to first preference on the proceeds of the sale after paying the expenses of the sale. *Marcelin v. His Creditors, 423.*
17. A notarial act of mortgage has no effect against third parties until it is registered in the office of the Recorder of Mortgages for the parish where the property is situated. *Harang v. Plattmier, 426.*
18. Where three separate mortgages have been executed on the same piece of property at different dates, and the last of the three is recorded first, and the property has been sold to pay them, the proceeds must be applied by preference to the payment of the mortgage first recorded. The fact that the last mortgagee had notice of the existence of the other two mortgages of prior date will not avail. *Ib.*
19. The transfer or assignment of a promissory note secured by mortgage carries with it all the rights of mortgage, and privilege given to secure it. *Perot v. Levasseur, 529.*
20. Where a series of notes have been executed, secured by mortgage on the same piece of property, and the payee transfers them to different third parties, the privilege of the holders is concurrent on the proceeds of the sale of the mortgaged property. *Ib.*

MORTGAGES—Continued.

21. A vendor of real estate in order to defeat the mortgage of his vendee, on the ground of fraud in the sale of the property, must show that the mortgagee was aware of the fraud at the time the contract of mortgage was made. *Mackler v. McClelland*, 579.
22. A party accepting a mortgage to secure the payment of a debt, is bound by the terms and sense in which it is expressed. *Bethel v. Hawkins*, 620.
23. The transferees of portions of a mortgage debt are entitled to be paid *pro rata*, out of the proceeds of the sale of the property mortgaged, without regard to the time when the transfer was made. *Begnaud v. Roy*, 624.
24. A party holding a mortgage entitling him to executory process to enforce it, may proceed *via ordinaria* against the mortgagee, either in the parish of his domicile and residence, or in the parish where the mortgaged property is situated. *Generes v. Simon*, 658.
25. A mortgage given by an heir on her individual property to secure her one-fifth interest in an annuity created by her father for the purchase of a lot of slaves, of which she inherited the one-fifth, is an accessory to the principal obligation, to-wit: the price of slaves, and cannot be enforced. *Lefevre v. Hagdel*, 663.
26. The mortgage of the wife attaches to the interest of the husband in the lands held in common before partition, to secure her claim for her paraphernal property received by him, and a *datien en paiement* to her in satisfaction of her claim is authorized. *Pecot v. Brothers*, 667.

NEW ORLEANS.

SEE APPEAL—*State ex rel. Belden, Att. Gen., v. Markey, Kaiser, et al.*, 842.

SEE CORPORATIONS—*Diamond v. Cain*, 809.

“ “ *State ex rel. Belden, Att. Gen. v. Leovy*, 538.

“ MANDAMUS—*State ex rel. Pinac v. Mount and Landry*, 352.

“ “ —*State ex rel. Avery v. Mount, Treasurer*, 369.

“ OFFICE AND OFFICERS—*State ex rel. Belden, Att. Gen., v. Leovy*, 538.

OBLIGATIONS.

1. Where two parties holding claims of equal dignity against a third, enter into an agreement in writing to the effect that one is not to take any legal steps without giving the other notice, and in disregard of the stipulations in the agreement, one of the parties proceeded by seizure and sale, he will not be allowed any preference over the other on account of the seizure thus made in violation of the agreement. In such a case the law will place the other party in the exact position he might have occupied had he received notice.

Mille v. Dupuy, 53.

OBLIGATIONS—Continued.

2. Where a debt existed between two parties who liquidated the same by note, at a time and under circumstances rendering the execution of the note illegal on account of one party residing within the Confederate and the other within the Federal military lines, during the late war, and the debtor promised to pay the debt after the war had ceased, with a full knowledge of the nature and origin of the obligation, the promise can be enforced and the debtor compelled to pay the obligation. *Ledoux v. Buhler*, 131.
3. A party who received a note for collection, and afterward returned it to the party from whom he received it, cannot be held responsible on proof that another party gave him notice, while it was in his possession, that he was the owner and would hold him responsible if he did not deliver the note. *Sutterfield v. Detavallade*, 650.

SEE ACTION—*Snodgrass v. Adams*, 136.

OFFICE AND OFFICERS.

1. Officers of the city of New Orleans, who received their appointment from the military authority during the time the city was under military control, have no claim against the city for salary for the term fixed by law for such office, where it is shown that they have been dismissed by the military before the term of the office expired by law. *Mandell v. New Orleans*, 9.
2. Where the salary of an officer is fixed by law for all services rendered in his official capacity, no action will lie for the recovery of additional compensation for alleged extra services. *Ib.*
3. The right to an office cannot be inquired into under a proceeding by mandamus. Only the right to the possession of the books, papers, rooms, keys, etc., can be made the subject of inquiry under this writ. 4 N. S. 623, 12 An. 719, Acts of 1868, p. 71, 199 and 220. *State ex rel. Sternberg Legarde*, 18.
4. In a controversy for an office the salary of which is fixed by law, it is not necessary to aver or prove that the amount is above five hundred dollars to give the Supreme Court jurisdiction. *Fish v. Collens*, 289.
5. The election of a party to an office does not depend upon the ineligibility of his competitor, but upon the will of the majority or plurality of the legal voters of the district. *Ib.*
6. Officers of the city of New Orleans who received their appointments while the city and State were under the control of the military authorities were removable at pleasure. *Hire v. New Orleans*, 428.
7. The thirteenth section of the act of September 14, 1868, repealing the charter of the City of Jefferson, approved March 8, 1867, did not abolish the offices of the corporation. This clause only repealed the old charter in so far as its provisions were not incorporated in the new charter. *State v. Kreider*, 482.

OFFICE AND OFFICERS—Continued.

8. The failure to hold an election for municipal officers of the city of Jefferson on the first Monday of January, 1869, as provided in section three of the amended charter, adopted September 14, 1868, did not vacate the offices which were filled by election under the charter of 1867. *Ib.*
9. The appointment to an office by the Governor is void if there was no vacancy at the time the appointment was made. *Ib.*
10. Section seven of act number thirty-nine of 1868, entitled "An Act to ascertain the eligibility of persons elected or appointed to office and to declare offices vacant," etc., is unconstitutional and void.
State ex rel. Downes v. Tourne, 490.
11. A judge of a court or other constitutional officer of the State may be removed from office by impeachment, by address of the Legislature, or by proceedings under the intrusion act, if it be judicially ascertained that he is disqualified by the constitution of this State or the United States. He cannot be removed from office by an act of the Legislature, nor has the Legislature the power to pass an act authorizing or instructing the Governor to declare an office vacant which is created by the constitution. *Ib.*
12. The appointment and commissioning by the Governor of a party to an office which has been legally filled, without the vacancy being first declared according to law, is an absolute nullity. *Ib.*
13. The title of the act of the Legislature of 1868, No. 27, entitled "An Act to determine the mode of filling vacancies in all offices for which provision is not made in the constitution" is sufficiently comprehensive to embrace the objects of the statute.
State ex rel. Belden, Att. Gen., v. Leovy, 538.
14. Section one of this act does not violate the constitution in requiring vacancies in municipal offices to be filled by appointment. *Ib.*
15. The Common Council of the city of New Orleans have no power to fill vacancies in offices of the corporation arising from death, resignation, or otherwise. In such cases it is made the duty of the Governor to appoint for the unexpired term. *Ib.*
16. Act No. 156 of 1868, in providing a mode of legally ascertaining whether persons holding office under the authority of the State of Louisiana are incompetent to exercise the duties thereof, by reason of the disabilities imposed on certain classes of persons by the Constitution of the United States, does not impose pains and penalties on any one, nor does this act assume authority which appertains exclusively to the Federal tribunals.
State ex rel. Sandlin, Dis. Att., v. Watkins, Judge, 631.
17. A suit brought under the intrusion act, No. 156 of 1868, against a party in office, is not to inflict punishment, nor to impose penalties or disabilities upon him, but simply to inquire into his right to hold and exercise the office. *Ib.*

OFFICE AND OFFICERS—Continued.

18. Section three of the act of Congress of twenty-fifth of June, 1868, entitled an act to admit the States of North Carolina, South Carolina, Louisiana and other States to the Union, provides that no person prohibited from holding office under the United States by section three of the proposed amendment, known as Article Fourteenth, shall be deemed eligible to any office in either of the said States. *Ib.*
19. The State Courts of Louisiana will enforce this law of Congress, and where it is ascertained by suit under the intrusion act, No. 156 of 1868, that a party is disqualified from holding an office under the provisions of this act, his disqualification will be judicially declared. *Ib.*
20. Proceedings against a party alleged to have usurped or intruded into an office, must be brought by the District Attorney, or District Attorney *pro tem.* of the parish in which the case arises, in the name of the State. *Hayes v. Thompson*, 655.
21. A party having held an office before the war, which required him to take an oath to support the Constitution of the United States, and, after the passage of the secession ordinance by the State, having accepted and filled the office of clerk of one of the District Courts of the State, is not disqualified from holding office by the act of Congress of 1868, admitting Louisiana to representation in Congress, nor by the fourteenth amendment to the Constitution of the United States. *Hudspeth, Dis. Atty., v. Garrigues*, 684.
22. The holding of the office of clerk of the District Court, while under the authority of the State while in rebellion, was not of itself an act of rebellion. *Ib.*
23. An act against a party for usurping, intruding into or unlawfully holding or exercising a public office in the parish of Orleans must be brought by the Attorney General in the name of the State. *State ex rel. Wickliffe v. Delassize*, 710.
24. In a controversy for office under the intrusion act, a third party, not holding or claiming the office in dispute, can not appeal from the judgment of the court *a quo*. *State ex rel. Sullivan v. Mount, Kendall*, 755.

SEE MANDAMUS—*State ex rel. Hero v. Pitot*, 336.

PARISH COURT.

1. The Parish Court is without jurisdiction *ratione materia*, in a suit to annul a sale, when the property involved exceeds in value the sum of five hundred dollars. *Royers v. Morrison, Ex*, 455.
2. The Parish Court is without jurisdiction *ratione materia*, in a suit where a succession is either plaintiff or defendant, and the amount claimed is above five hundred dollars. *Swan v. Gayle, Adm.*, 478.

PARISH COURT—Continued.

3. The act of the Legislature, approved October 6, 1858, No. 141 entitled "An Act further defining the jurisdiction of Parish Courts in succession cases," is unconstitutional, null and void, because the object of the statute is not expressed in the title. *Ib.*
4. The Parish Court is without jurisdiction *ratione materia*, in suit for a moneyed demand for or against a succession, where the amount in dispute is above five hundred dollars. *Succession of Bartlett*, 531.
5. The act of the Legislature of 1869, No. 110, entitled "An Act to amend and re-enact sections four and nine of an act entitled an act to organize the Parish Courts of this State," etc., in authorizing clerks of district courts to perform clerical duties of the parish courts, and receive the fees therefor, does not create the office of clerk of the parish court, and is, therefore, not in violation of article 117 of the constitution, which provides that no person shall hold or exercise, at the same time, more than one office. *Hawley v. Barlow*, 563.
6. The ninth section of the act of 1869, No. 110, in providing that the parish judges shall receive a salary and such fees as are allowed to clerks of district courts, in all cases of appeals from justices of the peace, does not violate that part of article eighty-six of the constitution which declares that parish judges shall receive a salary and fees, to be provided by law. *Ib.*
7. The Parish Court is without jurisdiction where the amount involved is above five hundred dollars. *Edwards v. Edwards*, 610.
8. The Parish Court is without jurisdiction, in a suit for a moneyed demand where the amount claimed is above five hundred dollars. *Derby v. Robertson*, 616.
9. The Parish Court is without jurisdiction *ratione materia*, in a suit where the amount involved is above five hundred dollars. *Hartman v. Rentrope*, 663.

PARTNERSHIP.

1. One partner cannot sue the other for a specific sum until the affairs of the partnership have been liquidated. The liquidating partner of a commercial firm cannot be called in warranty by the administrator on a demand against the estate of a deceased partner. *Succession of Dolhonde*, 8.
2. An action will not lie to recover an account for goods sold where it is shown that a partnership exists between the parties. In such a case the suit will be dismissed with the rights of the party reserved to sue for a settlement of the partnership accounts. *Marx v. Bloom*, 6.
3. Where one of three partners sells his interest in the partnership to the other two, who execute their agreement in writing, signed in their individual capacity, which he terms a counter letter, and he

PARTNERSHIP—Continued.

afterwards brings suit for a liquidation and settlement of the partnership affairs, and to recover his share of the profits, according to the terms and stipulations of the counter litter, any amount that may be found to be due by them on account of the purchase or profits must be borne jointly, and not *in solido*, each paying one-half thereof. *Lusk v. Graham & Cole*, 159.

4. The rule to be observed in making a settlement of partnership transactions is to ascertain the value of the assets, composed of the property, credits and receipts belonging thereto, and from the aggregate amount deduct the debts and expenditures; the balance remaining to be divided in accordance with the terms and stipulations of the partnership. *Ib.*
5. A and B were engaged as partners in the planting business in 1866. C, a merchant, furnished their supplies. In 1867, they continued their account with C, who continued to supply them as partners. Held—That they were bound to C, as ordinary partners, for the supplies furnished, notwithstanding they may have dissolved the partnership as between themselves. *Schorten v. Davis & Brother*, 173.
6. A contract or partnership between two parties, the one residing within the Federal lines of military occupation and the other within the lines of the insurrectionary forces, during the late war, for the purpose of carrying on a commercial business in the purchase and sale of cotton between the contending parties, was in conflict with the act of Congress of July 13, 1864, prohibiting all commercial intercourse between the contending parties. The rights and obligations growing out of such business relations being in contravention of a prohibitory law, cannot be judicially enforced. *McWilliams v. Bryan & Irvine*, 211.
7. In a suit for the liquidation and settlement of partnership transactions and accounts and a partition of the property held in common, all the partners or parties interested must be cited and made parties. *Francis v. Lavine*, 265.
8. The partner *in commendam*, by failing to have a final settlement of its affairs, does not *ipso facto* become responsible for the liabilities created by the active partner, after the expiration of the term of the partnership. *Slocumb v. De Lizardi*, 355.
9. A partner *in commendam*, having allowed his money to remain in the partnership after the expiration of the term, as shown by the recorded act, under the belief that he was still a partner *in commendam*, and only liable for the amount invested, cannot be held liable as a general partner, unless he has done something, or permitted something to be done, which the law declares will render him responsible as a general partner. *Ib.*
10. The surviving partner of a commercial firm, in his capacity of liquidating partner, having received Confederate treasury notes

PARTNERSHIP—Continued.

in payment of the debts due the firm, became personally responsible to the heirs of the deceased partner for the amount shown to be due them on a settlement of the partnership. *Succession of Wilder*, 371.

PR. Partnership property cannot be specially seized or attached for the individual debt of one of the partners. In such a case the interest of a partner may be seized. *Marston & Co. v. Dewberry*, 518.

PR. Partners have no cause of action against each other for a specific sum resulting from partnership transactions until there has been a settlement of the partnership. *Seicell, Ex., v. Cooper*, 582.

PR. Two parties having formed a commercial partnership in a single transaction, and having by mutual consent made a partition between them, may enforce their respective claims against each other without bringing suit for a settlement of the partnership.

Jenkins v. Howard, 597.

14. The purchase of lands at the succession sale of the estate of their mother by the heirs, and their subsequent planting in partnership, does not constitute them partners in the lands.

Pecot v. Brothers, 667.

15. A partnership which has for its object the acquisition of real estate, must be in writing. *Ib.*

16. Where a commercial firm has obtained judgment against a debtor, the firm is afterwards dissolved by the death of two of the partners, and the survivor forms a new partnership with two other parties, and a judgment is obtained against the new firm, on which execution issues, only the interest of the surviving partner in the judgment in favor of the old firm can be reached by seizure. The other interests in such judgment belongs to the heirs or creditors of the deceased partners, and cannot be made liable for the debts of the new firm.

Degelos, Durrie & Co. v. Woolfolk, 706.

17. The assets of a partnership, of which the deceased was a member, can not be made liable for the privileged claim of one thousand dollars, allowed by the statute of 1852 to the widow and heirs of the deceased partner, until the debts of the partnership are paid and a division of the assets are made between the partners. The decision in the succession of Cyrus W. Stauffer (*ante* page 520) reaffirmed.

Succession of Welling, 747.

PETITORY ACTION.

1. Plaintiff acquired title to a tract of land in the parish of East Feliciana, in 1849, and occupied it until 1862, when he left it in consequence of the operations of the war. In 1866 defendant entered upon it. In 1867 plaintiff brought a petitory action for the land and to recover rents, etc. Defendant in possession set up title founded on a Spanish grant, and a probate sale made in 1831, of a tract

PETITORY ACTION—Continued.

of land of seven hundred and twenty acres, alleging that the tract in controversy was included within that tract. The evidence shows that plaintiff proposed to buy defendant's claim, and that defendant refused to sell, but notified plaintiff that suit would be brought for the land. Suit never was brought. Under this state of facts, it was held by the court, that defendant not having shown a better title than plaintiff, that the proposition to buy defendant's claim never having been accepted, nor any suit brought as threatened, was not a recognition of the claim, and the plaintiff must recover.

Ernst v. Montigudo, 169.

PLEADINGS.

1. A general denial and plea to the merits admits the capacity of plaintiff.

Silvernagle & Co. v. Fluker, 188.

2. Where plaintiff claims in a representative capacity created by law, such as curator or executor, the want of authority must be specially pleaded in *limine litis*, in order to put the party on the proof of his capacity.

Ib.

3. An amended petition substituting a new party plaintiff on allegations of ownership, in direct conflict with the original petition, will not be allowed, nor will an amendment be allowed showing that the notes sued upon were transferred after suit was commenced and a reconventional demand was filed.

Duncan v. Helm, 303.

4. A brought suit against B on a promissory note for \$590 before the trial. A filed a supplemental petition, alleging a statement of account between A and B, which he makes a part of the supplemental petition, and alleges that C, a third party, binds himself as surety of B on the indebtedness, as shown by the statement. The agreement was offered in evidence on the trial by A, and showed an indebtedness of \$371, for which C became security. Held—That C was only bound as security for the amount shown to be due by the statement, and A having alleged that the agreement more fully shows the state of the case at the time the supplemental petition was filed, and having offered it in evidence on the trial, he was not entitled to recover more than the agreement showed to be due from B.

Cincinnati Insurance Co. v. Hite, 389.

5. Where there is no answer to an amended petition containing matters of substance, nor default taken, all subsequent proceedings are irregular and will be set aside on appeal, and the cause remanded to be proceeded with according to law.

Brown v. Brown, 461.

6. A peremptory exception that the petition discloses no cause of action admits, for the purposes of the exception, that all the allegations in the petition are true; and when from the allegations in

PLEADINGS--*Continued.*

the petition, if true. the court will be enabled to pronounce judgment thereon, the exception will be overruled.

Hastings v. Brantly, 516.

7. A peremptory exception that the petition discloses no ground of action, admits, for the purposes of the trial of the exception, that all the allegations in the petition are true, and no amount of evidence can have any influence in determining the question raised by the exception. *Bouligny v. Gary*, 642.
8. Citation served on a party whose native language is French, when the petition is only written in English, will interrupt prescription. *Leon v. Bouillet*, 651.
9. The exception that the petition is only written in the English language, when the mother tongue of the defendant is French, must be pleaded in *limine litis*. *Ib.*
10. A party holding a mortgage entitling him to executory process to enforce it, may proceed *via ordinaria* against the mortgagee, either in the parish of his domicile and residence, or in the parish where the mortgaged property is situated. *Generes v. Simon*, 653.
11. All petitions addressed to courts are required to be written in the English language, but where a portion of a petition, not essential, and without which the cause of action would still remain, is written in the French language, the petition will not be dismissed because it is not entirely written in the English language. *Ib.*
12. The dative tuor, as mortgagee for the minors, without reference to the amount, may demand as against the ordinary creditors, that the property be sold for cash or part cash. *Deblanc v. Gary*, 689.
13. A peremptory exception that the petition discloses no cause of action admits for the purpose of its consideration, all the allegations in the petition to be true. *Ib.*
14. All the parties to the suit must be made parties in an action to annul the judgment. *Haggerty v. Phillips*, 729.

PLEDGE OR PAWN.

1. A certificate of stock of a corporation and banking company, pledged by the owner to the company to secure the payment of a note and mortgage to the bank for money loaned, operates as a standing acknowledgment of the debt, and prescription does not run against the note while the stock is pledged. *Citizens' Bank v. Johnson*, 128.
2. A bank taking a note before maturity as collateral security for money loaned, becomes the holder in good faith for a valuable consideration. *La. State Bank v. Gaiennie*, 555.
3. The pledgee of a promissory note payable to the drawer's own order, and by him indorsed in blank, may sue and recover on the note without the indorsement of the pledger. *Ib.*

POLICE JURIES.

1. The police jury of the parish of Caddo has a right to establish as many ferries across the Red river or other water courses, and outside the corporation of Shreveport, and within the limits of the parish, as the public convenience may require.

O'Neill v. Police Jury, 586.

2. Warrants for money drawn by the police jury on the parish are prescribed by the lapse of five years from the time they become due.

Perry v. Parish of Vermilion, 645.

PRACTICE.

1. A motion to dismiss an appeal for reasons that are purely technical, such as informalities in the citation and service of appeal, must be made within three judicial days from the filing of the transcript.

Dumonchel, Tatrix, v. Lemerick, 80.

2. A promise to pay, subsequent to the maturity of the obligation, may be set up by amended petition.

Ledoux v. Buhler, 130.

3. Where the certificate of the clerk shows that the record contains all the testimony adduced, documents filed and proceedings had, the appeal will not be dismissed because there is no bill of exceptions, statement of facts or assignment of errors. 20 An. 513. C. P. 604, 602.

State Bank v. Cammack, 183.

4. The plea of prescription will be noticed when made for the first time in the Supreme Court.

Ib.

5. Where an important document, such as a mortgage, has been inadvertently omitted from the record, the Supreme Court will, in the exercise of a sound legal discretion, remand the case, in order that both parties may have an opportunity to establish their rights.

Smith & Co. v. Morrison, 125.

6. The filing of an answer by defendant, and trial on the merits, does not waive his right to nor preclude the judge *a quo* from considering and deciding a peremptory exception (filed at the same time with the answer) founded on law.

Fletcher v. Dunbar & Co., 150.

7. The exception that the petition discloses no cause of action, will be sustained in a case where, if all the allegations are true, no judgment can be pronounced thereon.

Ib.

8. A motion to dissolve an injunction on the face of the papers may be made after issue joined; in trying which, all the allegations of the petition are taken as true.

Butman v. Forshey, 165.

9. An execution cannot be enjoined on grounds that might have been pleaded before judgment.

Ib.

10. Where a party plaintiff to a suit gets married while the suit is pending, the supplemental petition, making her husband a party, need not be served on the defendant.

Flynn v. Flynn, 199.

11. Where the plea of prescription is filed for the first time in the appellate court, and the record discloses a state of facts which, if

PRACTICE—Continued.

- true, would defeat the plea, the case will be remanded for the purpose of admitting proof of the interruption of prescription.
Roddy, Adm., v. Robertson and Edwards, 191.
12. The plea of prescription may be made in the Supreme Court, and when the record shows that the obligation sued upon is prescribed, the plea will be maintained. *Nelson & Co. v. Scott*, 203.
13. Where mortgage creditors claim the proceeds of the sale of mortgage property made under a judgment, they cannot be permitted to allege the extinction of the judgment, and the consequent nullity of the sale under which the proceeds were realized.
Peychaud v. Citizens' Bank, 262.
14. To avoid the examinations of issues improperly raised by the answer, the more regular practice is to object to the introduction of testimony to sustain the n. *Schneider & Zuberbier v. Dreyfus*, 271.
15. Where a steamboat is sequestered in a suit against the owners, and released on their giving bond conditioned that they will not make any improper use of the property, and that they will faithfully present it after definitive judgment, the judgment creditor, after a final judgment has been rendered against the boat and owners, may proceed directly on the bond, without observing the formalities of issuing execution against the owners and having it returned *nulla bona*.
Noble & Kuiser v. Warnre, 284.
16. The plea of general denial only admits the signature on the face of the note. An agreement on the back of the note, signed by the maker, does not form a part of it, and it is not admitted by the general denial. *Boulin v. Rainey*, 335.
17. Irregularities in the proceedings of the probate court ordering the execution of a will, and the relative nullities of the titles to property cannot be inquired into collaterally.
Armstrong v. Davis, 419.
18. A party cannot make an appearance by rule to set aside a judgment by default on the ground that the proceedings against him was informal and contrary to law, and, at the same time, urge the exception of want of citation. *New Orleans v. Hall*, 438.
19. Alleged errors in the assessment roll must be proved, and it must be shown that the party complaining has in vain endeavored to have them corrected in the manner prescribed by law. *Ib.*
20. Receipts, bearing date prior to the settlement of the parties by note, cannot be pleaded as a demand in compensation and reconvention against the note. *Levy & Co. v. Carter*, 459.
21. A promissory note of a third party, due the defendant, cannot be set up in compensation against a demand of the plaintiff on the note of the defendant. *Ib.*

PRACTICE—Continued.

22. A party cannot claim the nullity of a judicial sale and the fruits of the sale in one and the same action.
Tarleton, Whiting & Tullis v. Kennedy, 500.
23. A peremptory exception may be pleaded as well after default as before. *Ib*
24. The allegation of a married woman in her petition that she is "joined and authorized" by her husband, is not sufficient authority to enable her to prosecute the suit. *Succession of Pomeroy*, 576.
25. The allegations in a petition for injunction against an order of seizure and sale show that the consideration of the debt for which the mortgage was given was Confederate notes, and that petitioner is the surviving partner of her deceased husband, and, as such, is entitled to one thousand dollars out of his estate by preference. Held—That the petition disclosed an interest in preventing the payment of this illegal debt, and therefore disclosed a cause of action.
Richard v. Beauchamp, 635.
26. A bill of exceptions to the rejection of evidence by the judge must state the grounds on which it was rejected. *Ib*.
- The objection that the petition does not state the full name and residence of the plaintiff, must be made *limine litis* by dilatory exception.
Taylor v. Littell, 665.
28. The objection that the plaintiff was not properly authorized to prosecute the action, must be pleaded specially in the court below. *Ib*.
29. A judgment that has been rendered without a judgment by default being first taken is illegal and null. *Ib*.
30. Where a final judgment has been rendered on default, and appeal taken therefrom, the cause will be remanded on the allegation without evidence, that the consideration of the note sued on was the price of a slave. *Ib*.
31. Where suit is brought by a judgment creditor against third parties to annul a sale, and a *datien en paiement* of property made by the judgment debtor to them, and they have not been made parties to the original suit, they may controvert the demand, although it be liquidated by a judgment, in the same manner that the original debtor might have done before judgment, and if the account on which the judgment is founded is prescribed, the plea will prevail as to them notwithstanding the judgment.
Pecot v. Brothers, 667.
32. H. C. Petty and the heirs of Wilder held property in common, on which a mortgage existed in favor of the Citizens' Bank. The heirs brought suit and obtained a partition in kind, which was executed before a notary public. The heirs then, through their tutrix, having obtained the consent of the bank, moved for a

PRACTICE—Continued.

division of the encumbrance, and obtained the permission to sign the necessary stock note in favor of the bank. The tutrix afterwards refused to sign the note. Held—That she was properly compelled by judgment, on rule, to sign the note, and that evidence was inadmissible, on trial of the rule, to show the condition of a partnership which had existed between their ancestor, Wilder, and the defendant, Petty, of which Petty was liquidator.

Heirs of Wilder v. Petty, 709.

SEE APPEAL—*Burke & Co. v. Edey & Pinckard*, 749.

PRE-EMPTION.

1. A party cannot attack, in the courts, the claim of a pre-emptor without showing a prior equitable right to the land. A possessor in good faith on eviction, is entitled to recover the amounts expended by him in useful improvements made on the land.

Mumford v. McKinney, 547.

PRESCRIPTION.

1. Where a promissory note has been suffered to prescribe on its face, and no sufficient showing is made by the holder that prescription has been interrupted, the plea will be maintained. 20 An. 131, 565.

Dumonchel, Tutrix, v. Lemerick, 30.

2. Prescription runs against all persons, except such as are included in some exception established by law. C. C. 3487. The existence of war is not among the exceptions established by law that will work an interruption or suspension of prescription.

Smith v. Stewart, 67.

3. The inability to sue will not avail against the plea of prescription, except in the cases specially excepted by law. C. C. 2512, 3483.

Ib.

4. The maxim *contra non valentem agere non currit prescriptio*, has no application in our system of jurisprudence. *Ib.*

5. Where an obligation or note is prescribed and the holder shows nothing that will operate an interruption or suspension of prescription, the plea will prevail. 20 An. 131, 423, 565.

Mechanics' and Traders' Bank v. Sanders, 106.

6. When the holder of a promissory has suffered it to prescribe in his hands, he cannot invoke the maxim *contra non valentem agere non currit prescriptio*, to relieve it from the effect of the plea of prescription.

Jackson v. Yoist, 108.

7. Each item charged in account as money paid out, or for services rendered, is prescribed in three years from its date.

Williams v. Gay, 110.

8. Where the plea of prescription is filed in the Supreme Court, and the record shows that the obligation on which the judgment of the lower court is founded is prescribed, and the appellee does not ask that the case be remanded to enable the holder to show an interruption, the plea will be maintained in the Supreme Court.

Long v. Heirs of Scott, 120.

PRESCRIPTION—Continued.

9. The plea of prescription will not be defeated for any cause not mentioned in the exceptions established by law.
Bartley, Johnson & Co. v. Heirs of Bosworth, 126.
10. The maxim *contra non valentem agere non prescriptio* forms no part of our written law, and cannot be invoked to defeat the plea of prescription. *Smith v. Stewart*, 67. *Ib.*
11. Notice of seizure and demand are necessary to interrupt prescription in a proceeding by executory process.
Mann & Co. v. Norton, 155.
12. When the notice has not been served until after prescription has accrued, the plea will be maintained. 20 An. 192. *Ib.*
13. A verbal promise to pay a promissory note will interrupt prescription, if made before prescription is acquired.
Silvernagle & Co. v. Fluker, 188.
14. A verbal promise to pay a promissory note before prescription has accrued, not denied when interrogated on facts and articles, will defeat the plea of prescription. *Harrell, Tutrix, v. White*, 195.
15. Prescription may be pleaded in the Supreme Court, and when no application is made to have the case remanded to show an interruption, the plea will be maintained, if the documents declared upon are prescribed on their face. *Roth v. Hebert*, 238.
16. Where more than five years have elapsed after the maturity of a promissory note, before suit is brought, and no interruption or renunciation is shown, the plea will prevail. C. C. 3505; 2 An. 131, 565.
Silvernagle & Co. v. East, 261.
17. Where a promissory note is prescribed on its face, and no interruption is shown, the plea will prevail. 20 An. 131, 565.
Peet, Simms & Co. v. Jackson, 267.
18. Where an open account is prescribed on its face, and the evidence fails to establish an interruption, the plea will prevail.
Boyle & Co. v. Kittredge & Ewing, 273.
19. Where a promissory note is prescribed on its face, and no interruption is shown, the plea will prevail. *Rabel v. Pourciau*, 20 An. 131.
Bank of Kentucky v. East, 275.
20. The burden of showing a renunciation of prescription of a promissory note after it has accrued falls upon the holder.
Offut v. Chapman and McKowen, 293.
21. An indorsement of a payment on the note after it is prescribed is not sufficient to interrupt prescription. *Ib.*
22. The parol testimony of the holder of a promissory note is not admissible to establish the interruption of prescription. *Ib.*
23. Prescription must be pleaded expressly and specially in order that the party against whom it is urged may have full notice to meet it. C. C. 3426, 3427. *Mansfield, Norton, Assignee, v. Doherty*, 395.
24. The items in the account of an agent are not prescribed by the

PRESCRIPTION—Continued.

lapse of three years from their date. Such claims are not embraced in the terms "open accounts," which, by the statute of 1852, are prescribed against in three years; ten years is the only prescription against such a demand. *Dolhonde, Adm., v. Laurans*, 406.

25. The payment of interest on a promissory note up to a particular date, and an extension of the time of the payment of the principal to that date, will interrupt prescription.

Marcelin v. His Creditors, 423.

26. The prescription of one year cannot be invoked by a party holding under a void title.

Warfield v. Bobo, 466.

27. The burden of proof is on the plaintiff to show an interruption where the note sued on is prescribed on its face, and if none is shown the plea will be maintained. *McStea v. Boyd & Blanks*, 501.

28. A payment of a promissory note, before prescription has accrued, by a third party, who has assumed the note in a notarial act, will interrupt prescription, which only begins to run again from the date of such payment.

Cockfield v. Farley, 521.

29. All informalities that occur in connection with the probate proceedings for the sale of land are prescribed by the lapse of five years from the date of the sale.

Pasiana v. Powell, 584.

30. The law makes no distinction, in regard to prescription, between negotiable and non-negotiable promissory notes and bills of exchange.

Robichaul v. Thorne, 611.

31. An order of seizure and sale granted on notes that were prescribed at the date of the order, will be set aside on appeal.

Taylor v. Hill, 626.

32. The maxim, *contra non valentem agere non currit prescriptio*, can not be invoked by the holder of a promissory note to defeat the plea of prescription.

Ib.

33. Citation served on a party whose native language is French, when the petition is only written in English, will interrupt prescription.

Leon v. Bouillet, 751.

34. An open account for moneys paid on a judgment, for materials, labor and carpenter work done, and improvements in repairs and improvements on the premises, is prescribed by three years.

French v. Riggs, 657.

35. Charges for board, lodging, and support of another are prescribed by one year.

Ib.

36. A written agreement to pay a certain amount of money to another, styled a bond, falls under the class or denomination of promissory notes, and is prescribed by the lapse of five years from maturity.

Succession of Voorhies, 659.

37. A payment made by a security will not interrupt prescription as to the principal debtor.

Ib.

PRESCRIPTION—Continued.

88. An account stated and closed by the written acknowledgment of the other party, is only prescribed by ten years. 14 An. 654; 20 An. 116.
Balnchin & Giraud v. Pickett, 680.
39. The prescription of five years cannot be invoked in a case where judgment has been rendered on the note, and execution and garnishment process has issued, and judgment against the garnishee has been rendered, from which an appeal has been taken by the original judgment debtor. In such a case the note becomes merged in the judgment, and five years prescription does not apply.
Guillory v. Deville, 686.
40. A suit to recover on a contract of agency is prescribed by ten years.
Poindexter and Pollard v. King, 697.
41. A verbal promise to pay a promissory note after prescription has accrued, will not work an interruption of prescription. To establish the interruption, the evidence must show that the promise was made before prescription was acquired.
Megibben & Brother v. Willson, 748.
42. After a note is prescribed, only written evidence is admissible to prove a renunciation. *Ib.*
- SEE APPEAL—*La. State Bank v. Cammack*, 133.
- " BILLS AND PROM. NOTES—*Bank of La. v. Williams*, 121.
- " EXEC. AND ADMINS.—*Sevier v. Suc. of Gordon*, 373.
- " POLICE JURIES—*Perry v. Parish of Vermilion*, 615.

PRIVILEGE.

1. The privilege of the consignee, who has made advances on the goods or property in his possession through his agent is superior to that of the attaching creditor. *Maxen & Shearer v. Landrum*, 366.
2. Where a carrier of freight for hire stores the property or goods in a warehouse at the port of destination, the charges of the warehouse keeper for storage forms a privilege on the goods superior in rank to that of the carrier for the freight.
Powers & Co. v. Sixty Tons of Marble, 402.
3. A merchant has a privilege on the crop for the necessary supplies furnished to make it. Act of 1843, amending article 3184 of the Civil Code. *Wood, Adm., v. Calloway*, 471.
4. No privilege is allowed on the crop for money advanced to the planter. *Ib.*
5. The privilege of the vendor who has delivered personal property is inferior to that of a lessor. *Succession of Gayle*, 487.
6. No privilege exists on movables for the payment of State and parish taxes. *Ib.*
- .. Where the fund produced by the sale of the movables of a succession has been exhausted by the special privileges, the immovables

PRIVILEGE—Continued.

or such portion as may be necessary, must be sold to pay the general privileges, to which time the settlement of the rank of the general privilege creditors must be postponed. *Ib.*

8. A factor or merchant has no privilege on the mules, cattle and implements attached to the plantation, or on the proceeds of the sale thereof, for advances made or supplies furnished to make the crop nor has the factor any privilege for money advanced to the planter who afterwards applied it to the payment of the laborers for working the crop. By giving the fund this direction by the planter and applying it to the settlement of privilege accounts, the factor does not become subrogated to the privilege. The privilege of the factor does not result from subrogation, but springs directly from the law which gives it. *Howe v. Whited & Gibbs*, 495.
9. The factor has a privilege on the crop for advances made, and supplies furnished in aid of its production. *Ib.*
10. Where the land, immovables by destination, and the growing crop have been sold in block, the value of the crop may be ascertained by proof after the sale has been made, and the privilege of the factor attaches to the proceeds.
11. A factor having a privilege on a crop of cotton for supplies furnished does not lose it by becoming the purchaser thereof at sheriff's sale. In such a case the privilege passes from the thing and attaches to the proceeds. *Ib.*
12. The privilege of the merchant for supplies furnished the planter is equal in rank with that of the lessor. *Mason v. Murray*, 535.

PROHIBITION.

1. Under the rules laid down in the Code of Practice, the Supreme Court of Louisiana will not take the general superintending control over the inferior jurisdictions. 3 M. 42; 2 La. 88; 19 La. 498; 8 An. 92. The writ of prohibition, the power to grant which is specially allowed by the Code of Practice to appellate courts of competent jurisdiction, is not a writ of right, and is within the sound discretion of the tribunal to which the application is made.

State ex rel. D'Meza v. Judge Fourth District Court, 123.

2. The writ of prohibition will not be granted by the Supreme Court of Louisiana against a tribunal of inferior jurisdiction, unless it be cases where its intervention is necessary for the maintenance of its appellate jurisdiction. *Ib.*
3. Where the evidence shows that the security on the appeal bond is not good and solvent, as required by law, the Supreme Court will not issue a writ of prohibition restraining the judge *a quo* from ordering execution to issue pending the appeal.

State ex rel. Simonds v. Judge Seventh District Court, 178.

PROHIBITION—Continued.

4. The Supreme Court will examine into the sufficiency of the surety on an appeal bond on application for a writ of prohibition, and if the surety is found to be good, the prohibition will issue restraining the judge from executing the judgment until the appeal is decided.

State ex rel. Storrs v. Judge Fourth District Court, 735.

SEE APPEAL—*State ex rel. Johnson v. Judge of Fifth District Court, 113.*

PROMISSORY NOTES.

SEE BILLS AND PROMISSORY NOTES.

PUBLIC DOMAIN.

1. A survey under the Spanish Government, when Louisiana was a province of that kingdom, not made in conformity with the forms and requirements of the order, and never approved or confirmed by the Spanish authorities, is merely an inchoate title. The land embraced by such survey passed by the treaty of cession to the United States as part of the public domain, the title to which vested in the new sovereign. *Arceneaux v. Benoit, 673.*
2. Where a party having such inchoate title, with partial confirmation by the United States Government, and in order to obtain a further concession under his claim enters into an agreement with contiguous proprietors by which they renounce their right to back concessions under the acts of Congress of 1811 and 1826, and he recognizes the full extent of their claims, he is estopped thereby, in an adjustment of boundary, from claiming limits which would conflict with those of the other party, under the pretense that his claim, under the original order of survey, has been fully confirmed by the United States. *Ib.*
3. The action of boundary cannot be prescribed against. Civil Code, *Ib.* article 821.

RES JUDICATA.

1. Where an appeal has been dismissed on the ground that all the parties interested in the judgment were not made parties to the appeal, and the same questions involved in the first judgment appealed from are again passed upon before the District Court, between the same parties in a judgment of homologation, and more than one year having elapsed from the rendition of the first judgment, it must be considered *res judicata* from which no appeal will lie. *Gay v. Marrienneaux, 288.*
2. In order to justify a court of justice in rejecting a demand as contrary to the authority of the thing adjudged, it is necessary that the thing demanded is the same as in the first suit, is founded on the same cause of action, and the contest is between the same parties, acting in the same qualities. To ascertain what is demanded in a particular suit resort must be had to the prayer of the petition. *Slocumb v. De Lizardi, 855.*

RES JUDICATA—Continued.

3. The plea of *res judicata* to a second suit will not be maintained, unless it is shown to be between the same parties and acting in the same qualities with that of the first, founded on the same cause of action and on the same demand; if either of these requisites is wanting the plea will be overruled. *Id.*
4. The plea of *res judicata* will not be maintained unless the parties to the first judgment are the same as those of the second.

Degelos, Durrie & Co. v. Woolfolk, 706.

RIGHT OF WAY.

1. The right of expropriating a right of way over a neighbor's property cannot be allowed, except in cases of extreme necessity, and where a party can make a road or passage over his own lots to the public streets, he must be required to do so. C. C. 695.

Perry v. Webb, 247.

SALE.

1. The possibility that a purchaser may be compelled to bring a suit at law to gain possession of the thing purchased, does not constitute it a litigious right. *Kellar v. Blanchard*, 38.
2. Where a lot of cotton is sold by weight, delivery does not take place until the cotton is weighed. The sale is incomplete until actual delivery has taken place. The fact that the vendor subsequently sold and delivered the cotton to another party, is incompatible with delivery to the first vendee. *Duncan v. Holt & Co.*, 235.
3. A written act of sale of real estate has no effect against third parties until it is recorded in the proper office, unless it is shown that the party affected by it had knowledge of its existence and contents. *Smith v. His Creditors*, 241.
4. Where a sale of personal property has been completed by delivery (although fraudulent), the judgment creditor of the vendor can not seize it in the hands of the purchaser until the sale is declared null by a revocatory action. The case is different in a simulation. *Schneider & Zuberbier v. Dreyfus*, 271.
5. A deposited a lot of jewelry with B to be raffled, and afterwards gave C, a creditor of his, an order on B for the jewelry or its proceeds. Held—That this order did not establish either a sale or *datien en paiement* of the jewelry, and that C cannot be considered as the owner. *Aguader v. Quish*, 321.
6. A purchased a lot of furniture at auction sale, and afterwards induced the auctioneer to make the bill of sale to B. B then executed a notarial act of loan of the furniture to A. The furniture was seized by the creditor of A, and B enjoined. Held—That A was the owner of the property, and the bill of sale from the auctioneer to B, and the notarial act of loan from B to A, were a mere sham, a simulation, to screen the property from the pursuit of the creditors of A. *Stewart v. Cohn*, 349.

SALE—Continued.

7. To enable a party to recover damages for a breach of contract of sale he must show that a sale was actually made.

Glenn v. Ferguson, 385.

8. A lease for hire of a pair of horses and buggy, at a stipulated price per day is not a sale. *Ib.*

9. In a sale of goods in New York to a merchant in New Orleans, by samples presented by an agent in New Orleans, to be delivered in New Orleans in quality equal to the samples presented, the sale is not complete until the goods are delivered, and they are at the risk of the seller until delivery takes place.

Millard v. Max Nihoul, 412.

10. In a written contract of sale of a lot of one hundred bales of cotton between A and B the following stipulations appear: *First*—A declares that he sells B one hundred bales of his cotton crop then on his plantation. *Second*—The cotton was to be delivered at Randle-son's Landing, or at some other convenient point on the river. Suit is brought by B to enforce the performance of the contract and a writ of sequestration issued, and a few bales of cotton on the plantation in the seed were sequestered by the sheriff. A *fi. fa.* was issued on a judgment in favor of the wife against A and the same cotton was seized by the sheriff. Held—That as B had no privilege on the cotton, and the sale not being completed by delivery, the weighing and counting of the bales being essential to perfect the sale, the seizing creditor must hold the cotton as against the sequestration.

Abat & Cushman v. Atkinson, 414.

11. Where a party demands the rescission of a sale, he must, as a condition precedent, return, or offer to return, the consideration which he has received.

Latham v. Hicky, 425.

12. The precarious possession of personal property carries with it the presumption of simulation, C. C. 2456, 16 An. 5, but this presumption may be disputed by the vendee showing the reality of the sale.

Guice v. Sheriff Sanders, 463.

13. Where the evidence shows that the sale of personal property was real and bona fide the injunction will be perpetuated against the seizing creditor of the vendor. *Ib.*

14. A sale of a tract of land by one of three joint owners will bind the other two, or either of them, if it is shown that they or either of them were present at the sale and made no objection thereto, but on the contrary advised and urged the sale. *Crownover v. Randle*, 469.

15. The sale of an undivided tract of land by one of the three joint owners is null as to the interest of the party who was not present at the time, and afterward refused to ratify the transaction. *Ib.*

16. A vendor cannot maintain an action to rescind a sale and retake the property conveyed without returning or tendering to the vendee the portion of the price which he has received. *Lee v. Taylor*, 514.

SALE—Continued.

17. In a sale of land, slaves and movable property, after the date of the emancipation proclamation, where the evidence shows that a portion of the price has been paid, equal to the value of the land and movables, the law will impute the payment to the land and movables, and the balance of the price, being without consideration, cannot be enforced. *Haden v. Phillips and Foster*, 517.
18. The stipulation in a written contract of sale of a lot of cotton that "delivery is accepted," will dispense the vendor from further delivery, and place the property at the risk of the purchaser. *Duplex v. Gallien*, 534.
19. A sale of immovables has no effect against third parties, until it is recorded in the proper office, in the parish where the property is situated. *Meyer & Brother v. Simpson, Sheriff*, 591.
20. The sale of the property of a minor by the tutor, for Confederate notes as the consideration, is an absolute nullity; and the minor may sue for and recover back his property, or its value, from the vendee after delivery. *White v. Nesbit*, 600.
21. A sold the contents of a coffee-house to B and C, for which B and C gave each their notes for one-half of the price. B gave a mortgage to secure the whole debt on his own property, and afterwards, at the maturity of the notes, paid one of them, and made a payment of one-half of the amount of the other. C subsequently transferred his one-half interest in the coffee-house to B, for a fixed price. A brings suit by executory process to recover the balance of the outstanding note; B enjoins on the grounds of extinction of the debt and mortgage. Held—That the transfer from C to B, of his one-half interest in the coffee-house was not a *datien en paiement*, but a sale, and that the property mortgaged not being the same as that sold from one co-debtor to the other, the debt was not extinguished by confusion. *Bessan v. Moucheux*, 617.
22. The fact that a party owes more than his property will sell for, does not prevent him from selling, and a sale made under such circumstances will not be avoided unless fraud is shown. *Pecot v. Brothers*, 667.

SEE JUDICIAL SALES.

SEE SEIZURE AND SALE.

SEIZURE AND SALE.

1. A third party cannot hold personal property against a seizing creditor if he has permitted the property purchased to remain in the possession of the seized debtor. *D'Armand v. Sheriff*, 198.
2. A seizure and sale of property under a writ of *fi. fa.* was made on twelve months' credit, for which a twelve months' bond was given with approved security. At the maturity of the bond a *fi. fa.* was issued thereon against the principal and surety and property

SEIZURE AND SALE—Continued.

seized and again sold on twelve months' credit, for which a second twelve months' bond was given with approved security. At the maturity of this second bond execution again issued against the principal and surety. Held—That the second bond was taken without any warrant or authority of law, and could not, therefore, be enforced in the summary manner provided by law for the executions of twelve months' bonds. The execution on the second bond would be stayed by injunction. *Wieck v. Babin*, 230.

3. An *ex parte* order of court directing the payment of money does not bind a party entitled to the proceeds of the sale of the property sold under execution, nor will it protect the sheriff.

Citizens' Bank v. Payne & Gilman, 380.

4. The sheriff cannot pay out funds in his hands derived from the sale of property under execution which is subject to conflicting claims, on his own authority. *Id.*

5. Where it is shown that the sheriff had knowledge of the superior mortgage claims to the funds in his hands arising from the sale of property under execution, and he pays over the funds to another claimant of inferior grade, he becomes personally and officially liable to the creditor of superior rank for the amount thus illegally paid. *Id.*

6. In a judicial sale of real estate, the petition, judgment, notice of judgment, seizure, and notice to appoint an appraiser, together with the sheriff's deed were shown in a suit to annul the sale. Held—That the title was sufficiently made out without showing the *fi fa* and the sheriff's return. *Coulson v. Wells*, 383.

7. The property of the surety on the official bond of the sheriff can not be seized and sold under a judgment against the principal and surety, until that of the principal has been discussed.

Stinson v. Hill, Sheriff, 560.

8. Two parties claim the same piece of property from the same source of title, the one deriving his title by purchase at private sale, and the other by purchase at a judicial sale under a mortgage, the existence of which was known to the purchaser at private sale at the time, and the evidence shows that the description of the property at the forced sale is the same as that in the private sale. Held—That the purchaser at the forced sale cannot be defeated in his title at the suit of the claimant at private sale, on the ground of want of sufficient description of the property at the public sale.

Smith v. Logan, 577.

SEQUESTRATION.

1. The military orders issued to the banks of New Orleans during the late war directing them to make a statement of such deposits as belonged to officers of the army of the Confederate States, and

SEQUESTRATION—Continued.

directing them to pay over to the proper officer of the Quartermaster's Department of the United States all moneys in their possession belonging to or showing upon their books to the credit of such persons, was an attempt on the part of the military authorities to sequester these funds. *Nelligan v. Citizens' Bank*, 332.

2. A bank can not be relieved from paying a deposit to the proper owner on the ground that it has paid over the amount of the deposit in Confederate treasury notes to the Quartermaster of the United State army, under military orders, unless it is shown that the deposit was made in the bank in Confederate money with the knowledge of the depositor. *Ib.*

3. The sequestration and taking possession of Confederate treasury notes by the military authorities of the United States, which the banks of the city of New Orleans had given over as the deposits of officers engaged in the rebellion, did not amount to a sequestration by the United States of the credits of said parties, against the banks. *Ib.*

4. Confederate notes having been issued in violation of law, and against good morals and public policy, could not form the basis of a seizure or sequestration so as to exonerate the banks from liability to their depositors. *Ib.*

SHERIFFS AND DEPUTIES.

1. A sheriff may cause a deed to be made and attested by any of his legally qualified deputies, and when so made and attested it has the same validity as though it were made and attested by the sheriff.

Kellar v. Blanchard, 38.

2. Where it is shown that the sheriff had knowledge of the superior mortgage claims to the funds in his hands arising from the sale of property under execution, and he pays over the funds to another claimant of inferior grade, he becomes personally and officially liable to the creditor of superior rank for the amount thus illegally paid.

Citizens' Bank v. Payne & Gilman, 38.

3. The capacity of a sheriff, duly commissioned as such, can not be tested or inquired into by an injunction against a seizure made on a *fi. fa.* *Turner v. Hill and Durdin*, 543.

SEE ATTORNEYS—*Rosenfield v. Adams Express Company*, 590.

SOVEREIGN POWER.

1. The act of the sovereign power in proclaiming the abolition of slavery throughout the United States annulled all contracts based on slavery, and article 128 of the State constitution did not affect such contracts by prohibiting the courts from enforcing them.

Dranguet v. Rost, 538.

2. A promise made after emancipation, to pay a promissory note given for a slave, cannot be judicially enforced. Constitution, art. 128.

Ib.

SUBROGATION.

1. Where a third party pays a judgment to the attorney of the judgment creditor under a writ of *fiery facias*, and takes an order of court where the judgment was rendered, on the motion of the attorney, subrogating him to all the rights of the judgment creditor in the judgment, he becomes legally subrogated thereto, and conventional subrogation takes place by the act of the attorney.

Nugent v. Potter, 746.

STOPPAGE IN TRANSITU.

1. The courts of Louisiana will recognize and enforce the right of stoppage in *transitu* arising from a sale of goods in New York to an insolvent residing in New Orleans. *Blum & Co. v. Marks*, 268.
2. The transitus of goods is not at an end while in the custody of the carrier, and before they have been delivered to the consignee. *Id.*
3. To entitle the vendor to have the goods stopped in *transitu* he must show that, at the time of the sale, he was ignorant of the insolvency of the vendee. The discovery of the insolvency before the delivery is sufficient to entitle the vendor to the exercise of the right, although the goods may have been attached by a creditor of the vendee.

Id.

SUCCESSIONS.

1. In a suit by the holder of mortgage notes against the succession, and the heirs, who, it is alleged, have taken possession without settling up the estate, the record must show that the original maker of the notes is dead, and that the heirs are in possession of the property. In such a case, where citation has issued to the heirs, and judgment by default has been confirmed against them, and appeal taken therefrom, the case will be remanded to the lower court to be proceeded with according to law. *Britton & Co. v. Heirs of Scott*, 112.
2. Where the legatee or his assignee has obtained possession of money and assets of the succession in violation of law, and the executor brings suit to recover the same for the benefit of the estate, the legatee cannot set up in defense that his possession was in payment of the legacy. *Morel, Testamentary Ex. v. Suryi*, 184.
3. When an heir becomes the joint proprietor of mortgageable hereditary property, the mortgage resulting from the recording of a judgment against him attaches to his part or portion thereof, subject to the prior debts and mortgages of the succession. The enforcement of such mortgage is dependent upon the final settlement of the succession. *Succession of Tureau v. Gex, Adm.*, 253.
4. Where succession property has been sold at probate sale, the mortgage creditors may pursue the funds arising from the sale by way of third opposition to the account of the administrator, and have

SUCCESSION—Continued.

their mortgage rights recognized and enforced against the proceeds of the sale of the mortgaged property, the same as they could against the property itself before the sale. *Ib.*

5. Where a debt has been contracted against an estate for supplies furnished, bills paid, etc., by the commission merchant, and a partition of the estate is afterward made among the forced heirs without providing for the debt, suit may be brought by the creditor against the heirs, jointly at the domicile of the succession. The allegation in the petition that some of the heirs named reside in other parishes than that where the suit is brought will not give rise to the exception of domicile. *Lee v. Goodrich, Tutor, 278.*

6. In a contest between the heirs of their deceased mother and the surviving husband for a partition of the separate estate of the deceased, a declaration made in the act of sale of real property to the deceased mother that the purchase was made by the wife with funds derived from the income and revenue of her separate paraphernal estate is, as between the heirs of the wife and her husband, who signed the act, conclusive against him. 16 An. 270.

Succession of Wade, 343.

7. Where an unmarried woman enters into an agreement in writing before a notary public for the purchase of real property, and makes a cash payment for a portion of the price, and executes her notes for the balance due at a future date, and she marries before the maturity of the notes, and the title is made in accordance with the agreement after the marriage takes place, the property thus acquired will, as between the husband and wife, form a part of her separate paraphernal estate. *Ib.*

8. If the succession be accepted with benefit of inventory, no part of it goes into the possession of the heirs as such until the estate shall have been administered, and until such administration the estate must remain under the authority of the Court of Probates, where it was opened *Succession of DeRoffignac, 364.*

9. Real property situated in Louisiana, owned by a French subject, residing in France, cannot be administered in the courts of France; such property thus situated forms a separate succession from that in France, and must be administered according to the laws of Louisiana. *Ib.*

10. Heirs residing in France must be recognized as such by the courts of Louisiana before they can be put in possession of property situated in this State, which they have inherited from their ancestors in France. *Ib.*

11. The opening of a succession and the appointment of an administrator in a parish where the deceased never has resided, nor owns property therein at the time of the death, are absolute nullities; and any and all proceedings had and all judgments rendered against the succession are void. *Milttenberger v. Knox, 399.*

SUCCESSION—Continued

12. Where the creditors of a succession are litigating their rights contradictorily with each other, and the value of the succession exceeds five hundred dollars, an appeal will lie to the Supreme Court, although the claim of each creditor may not amount to that sum.

Succession of Gale, 487.

13. The holder of a claim against a succession, approved by the administratrix, is not likened to the holder of a note payable to bearer, and he is not dispensed from proof of ownership when denied by other creditors.

Ib.

14. An heir, of age, by accepting the succession, purely and simply, becomes personally liable for the debts of the estate.

James v. Hynson and Sheriff, 566.

15. A creditor who permits the heir to take unconditional control of the estate, without causing it to be administered, loses the right to pursue the property of the succession, as distinct from that of the heir.

Ib.

16. A sole heir having accepted the succession of her mother purely and simply, has the right to take possession of the property, and her husband, by administering it with her permission, does not become personally responsible for the debts of the succession.

Leon v. Bouillet, 651.

17. In 1861, before emancipation, a number of slaves were sold at probate sale, and purchased by the heirs. In 1867, after emancipation, the administrator filed his account debiting each one of the heirs with the amount of his purchase for slaves, which had not been paid into the succession, against which he opposed the amount of their respective inheritances, crediting or charging them with the difference, as the case might be. The heirs opposed the homologation of the account. Held—That under the settled jurisprudence of the State, the obligations contracted by the heirs in 1861, on account of their purchase of slaves, being null and void, could not be an element in either confusion or compensation; nor could that portion of the proceeds for the sale of slaves form a part of the assets of the estate, and that the administrator must account to the heirs for their portions, without taking into account the sale of slaves as assets, and without charging the heirs with the amount of their purchase for slaves.

Succession of Patin, 661.

SEE EXECUTORS AND ADMINISTRATORS.

SEE EXECUTORY PROCESS—*Randolph v. Chapman*.

TAXES AND TAX SALES.

1. The third section of the act of the Legislature of 1855, page 327, prohibiting Municipal Corporations within the State from levying any tax on persons engaged in selling articles manufactured by themselves within the State, is not in conflict with article 118 of the Constitution of 1863. A tax levied by the city of New Orleans on such persons is illegal. *New Orleans v. Lussé and Rhulman*, 1.

TAXES AND TAX SALES—Continued.

2. A contract with the City of Jefferson for curbing and gutter built on the sidewalk within the corporation is not a tax, toll, or impost, within the meaning of article 74 of the Constitution of 1868.

Rooney v. Brown, 51.

3. The act of the Legislature, No. 114, approved on the twenty-ninth of September, 1868, levying a tax of one per cent. on the cash value of all the immovable and movable property in the State, according to the assessment rolls for the year 1867 (being the last assessment which at that time had been made), is not retrospective in its operations, and does not therefore conflict with article 110 of the Constitution of 1868.

Fellson v. Mahan, 79.

4. The selecting the assessment of 1867 (the last one then made), as a basis for a tax, levied in 1868, was a subject which was exclusively within the legislative control. The principle of equality and uniformity enunciated in article 118 of the Constitution of 1868, is not violated by selecting a previous assessment of the property taxed as a basis of estimate of the amount of taxes to be collected. *Ib.*

5. A State tax collector is competent to sue for and recover in the name of the State any tax or license due by a tax payer.

State v. King, 201.

6. The act of the Legislature of 1865 imposing a license tax on attorneys at law is equal and uniform on all persons engaged in the practice of the profession, and is therefore not in conflict with article 124 of the Constitution of 1864, nor with article 118 of the Constitution of 1868. *Ib.*

7. The State, having authorized the issuing of a license to a party to practice law, is not thereby precluded from taxing such party annually for pursuing the profession within the State. *Ib.*

8. The penalties imposed on merchants for selling hay in the city of New Orleans without first having it inspected according to law is not a tax upon imports or upon the produce of other States of the Union brought here for sale, but is simply a protection to the public against the introduction of commodities that are unfit for commerce.

State v. Fordick, 256.

9. The Constitution of the United States expressly permits the States to pass inspection laws. *Ib.*

10. The city ordinance of the city of New Orleans for the year 1866, which declares that "every keeper of a warehouse where produce, goods, wares or merchandise are received on storage, one hundred dollars for each and every warehouse" was intended to impose a license tax of one hundred dollars upon the particular calling or business of keeping a warehouse, and not a tax upon the warehouse itself.

Hodgson v. New Orleans, 301.

11. Such a tax is uniform upon all persons engaged in that kind of business. *Ib.*

TAXES AND TAX SALES—Continued.

12. The act of the Legislature of the sixteenth of March, 1866, No. 122, exempting certain property from taxation during the war, was annulled by article 149 of the Constitution of 1868.

Police Jury v. Heirs of Burthe, 325.

13. By the act of the Legislature of March 28, 1867, the assessment of taxes for the year 1860, and the consecutive years to 1864, inclusive, were extended until the first of January, 1870. Suits brought for the taxes on property for these years is therefore premature, and must abate until the first of January, 1870. *Ib.*

14. The act of the Legislature of 1855, authorizing the imposition of a license tax of one thousand dollars on such insurer or insurance company not chartered by the State, and only imposes a license tax of five hundred dollars on each insurance company chartered by the laws of the State, is not in conflict with that provision of the Constitution which requires that taxation shall be equal and uniform. 10 An. 402.

State v. Fosdick, 434.

15. State warrants drawn by the Auditor of Public Accounts are receivable in payment of taxes or licenses, and a party depositing them with the collector is exempt from the payment of interest, costs or damages from the date of such deposit. Act No. 1 of 1869.

State v. Cassard, 751.

TUTORS AND TUTORSHIP.

1. The tutrix, under an order of the court, filed a final account of her tutorship, which the under tutor opposed. The District Judge dismissed the account and ordered the tutrix to file another within fifteen days. Held—That the account first filed should have been amended and corrected, and homologated as thus amended. The under tutor is not responsible for the expenses of litigations with a tutrix in behalf of minors unless he act in bad faith. 19 An. 153.

Succession of Samuels, 15.

2. The acknowledgment and promise to pay by a tutrix in her individual capacity will not interrupt prescription as to the succession. 15 An. 168.

Stowers v. Succession of Blackburn, 127.

3. A tutor is a competent witness to prove the correctness of his tutorship account. Acts of 1868, page 269.

Tutorship of the Minor. Scott, 187.

4. A tutor, in making up an account of his tutorship when he has engaged in planting in partnership with another, with the property under his control belonging to his ward, the plantation expenses must first be separated from the individual expenses, and, after deducting them from the proceeds of the crop, the balance must be proportionately divided, and the individual expenses chargeable to the minor must be deducted from his portion. *Ib.*

5. The holder of an obligation signed by the tutor cannot recover against the minor, unless he shows authority in the tutor to make it.

Carroll & Co. v. Doughty, Tutor, 374.

TUTORS AND TUTORSHIP—Continued.

6. An obligation signed by the tutor for supplies to carry on the plantation of his ward will not bind the minor, unless it is shown that he is authorized to carry it on for and on account of the minor, or that the advances made inured to his benefit. *Ib.*
7. A tutor residing in a foreign country or in another State of the Union cannot receive letters of tutorship from the courts of Louisiana, nor be recognized as testamentary executor without first giving bond and security under such conditions as are required by law from dative testamentary executors. Acts of 1842, sec. 5, page 302. *Succession of Young, 394.*
8. The surviving husband having qualified as natural tutor to his minor children, and caused an inventory of the community property to be made, and on that basis caused the one-half interest of the wife in the community to be adjudicated to him, for which he executed a special mortgage in favor of the heirs on his own property, and he dies, and a dative tutor is appointed to represent his minor children, the dative tutor, thus appointed, may vote at the deliberations of the creditors to dispose of the property of the deceased, an insolvent. *Deblanc, Tutor, v. Gray, 689.*
9. The dative tutor, as mortgagee to the minors, without reference to the amount, may demand, as against the ordinary creditors, that the property be sold for cash or part cash. *Ib.*
10. The executrix and tutrix, having interests in common with the major and minor heirs, are incompetent to represent the minors in a judicial partition. *Succession of Schuttler, 712.*
11. Proceedings in partition, where the tutrix has represented the minors without the advice of a family meeting, are null, and the purchaser of property at a sale made under such circumstances, cannot be compelled to pay the price bid. *Ib.*
12. The minor has a legal mortgage on the property of the tutor or tutrix to secure the faithful administration of his estate. *Hatcher v. Jackson, 737.*
13. Where the mother of the minor heirs contracts a second marriage without the consent of a family meeting, she loses the tutorship, but if she first obtains the consent and approval of a family meeting she retains the tutorship, and her second husband becomes the co-tutor to the minors by a former marriage. In such a case the property of the co-tutor is not under legal mortgage for the faithful administration of the tutorship. *Ib.*

WARRANTY.

1. The liquidating partner of a commercial firm cannot be called in warranty by the administrator on a demand against the estate of a deceased partner. *Succession of Dolhonde, 3.*

WARRANTY—Continued.

2. A sale of imported goods at the port of New Orleans in 1861 and 1862, while the city and State were under the control of the insurgents, did not impose on the vendor the obligation of warranty against eviction for the non-payment of duties to the United States. Under such circumstances, the purchaser is presumed to have contracted with reference to the fact that the duties had not been paid.
Snodgrass v. Adams, 136.
3. Where a party in possession of immovable property by a gratuitous title is sought to be evicted, he cannot evoke the plea of prescription, nor call the donor in warranty. *Bister v. Menge*, 216.
4. Plaintiff had leased the bar on the steamboat T. D. Hine for one year from the agent of the owner. Before the expiration of the lease the boat was purchased by the captain (Worley,) who forcibly ejected the lessee from the bar and put him off the boat. He brings suit against the former owner, the former master, and the present owner and master, to recover the damages he had sustained, alleging a conspiracy between these parties to gain possession of the bar. The last owner of the boat pleaded the exception of domicile which was sustained by the court below, and the suit dismissed as to him. Held—That the warranty by the vendor only extended to eviction, and could not be extended by the court so as to cover a case of assault and battery; that a conspiracy not being established by the evidence, and the last vendor and present owner of the boat not being before the court in this suit, plaintiff's demand for damages in this suit must fail. *Jones v. Worley*, 404.

WILLS.

1. The rule that testaments are more easily avoided than contracts, on the ground of mental unsoundness, does not refer to the amount of intellect required in a testator. So far as the latter is concerned, a will may be made by any mind which has the soundness and strength necessary to endure the conflict involved in the making of a bargain.
Chandler v. Barrett, Ex., 58.
2. Insanity is never presumed. *Ib.*
3. If a testament present a series of wise and judicious dispositions, the *onus* is upon the heirs who attack it to prove unsoundness of mind at the date of its execution. *Ib.*
4. If by facts occurring near the time of the date of the testament, and preceding and following it, the heirs have proved an habitual state of insanity, then, and notwithstanding the wisdom of the will, the *onus* would be shifted on the legatee to prove the sanity of the testator during the intermediate time, that is, at the date of the testament. *Ib.*
5. If, however, no habitual state of insanity is established, and the acts of folly are rare, and occur at periods distant from each other

WILLS — Continued.

and from the date of the testament, the testament, if not destitute of good sense on its face, will be presumed to be the offspring of a healthy volition and a lucid memory. *Ib.*

6. A nuncupative will by public act must bear upon its face the evidence that all the formalities required by law for its validity have been observed by the notary in drawing the testament.

Succession of Wilkin, 115.

7. A nuncupative will by public act is null, if it does not appear on its face that the witnesses were present at the time the testator was dictating it to the notary, and also when the notary read the instrument as written down by him, to the testator. *Ib.*

8. The formalities necessary to be observed to give validity to an olographic testament are, that the will must be written, dated and signed by the testator himself. *Succession of G. Ehrenberg, 280.*

9. A party may dispose of his property by last will, by instituting an heir, or by naming legatees.

10. Where the language of a testament leaves the meaning of the testator doubtful, acts done by him after its execution may be taken into consideration as explanatory of, and in ascertaining his intentions. C. C. 1708. *Ib.*

11. The declarations of the testator in his last will and testament are presumed to have been made with deliberation and reflection, and are entitled to due consideration, but they cannot be permitted to outweigh his express acknowledgment in an authentic act.

Succession of Forsyth, 367.

12. The act by which a testamentary disposition is revoked must be made in one of the forms prescribed for testaments, and clothed with the same formalities. *Hollingshead v. Sturgis, Ex., 450.*

13. A nuncupative will by private act, not having been read by the testatrix to the witnesses, nor by one of them to the rest, in her presence, is invalid as a testament, and will not operate as a revocation of a valid will. *Ib.*

14. A letter written by the testator, posterior the date of the last will, not clothed with the formalities required for a testament, will not operate a revocation of the last will and testament of the deceased. *Ib.*

WITNESSES.

1. The State Engineer having made a contract in conformity with the act of 1857, page 162, for improving and draining Bayou Bourbieux, which lies in the parishes of West Baton Rouge and Iberville, is a competent witness to testify as to the performance of the work in accordance with the contract. *Grady v. Desobry, 132.*

2. The fact that the engineer is required by the contract to make a report to the police jury of the completion of the work does not

WITNESSES—*Continued.*

disqualify him from testifying to other facts not embraced in his report. *Ib.*

3. The husband of his deceased wife is not a competent witness to testify in any suit *against* the interest of her succession, to any fact which took place during her life time

Succession of Wade, 343.

4. The testimony of a witness taken by commission will not be allowed to go to the jury, if it contains nothing but hearsay evidence.

Poutz v. Jones, 726.

5. A witness on the stand will not be permitted to give opinions in answer to hypothetical questions. *Ib.*

6. The husband cannot be a witness for or against his wife in a litigation to which she is a party. Acts of 1867, page 269.

Willis v. Kern, 749.

E. R. J.

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